

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 179

FRANK P. CHESBROUGH, PLAINTIFF IN ERROR,

vs.

FRANK T. WOODWORTH.

No. 180

FRANK T. WOODWORTH, PLAINTIFF IN ERROR,

vs.

FRANK P. CHESBROUGH.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

FILED JULY 2, 1918.

(94,818)

(94,820)



(24,819)

(24,820)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 536.

FRANK P. CHESBROUGH, PLAINTIFF IN ERROR,

vs.

FRANK T. WOODWORTH.

No. 537.

FRANK T. WOODWORTH, PLAINTIFF IN ERROR,

vs.

FRANK P. CHESBROUGH.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

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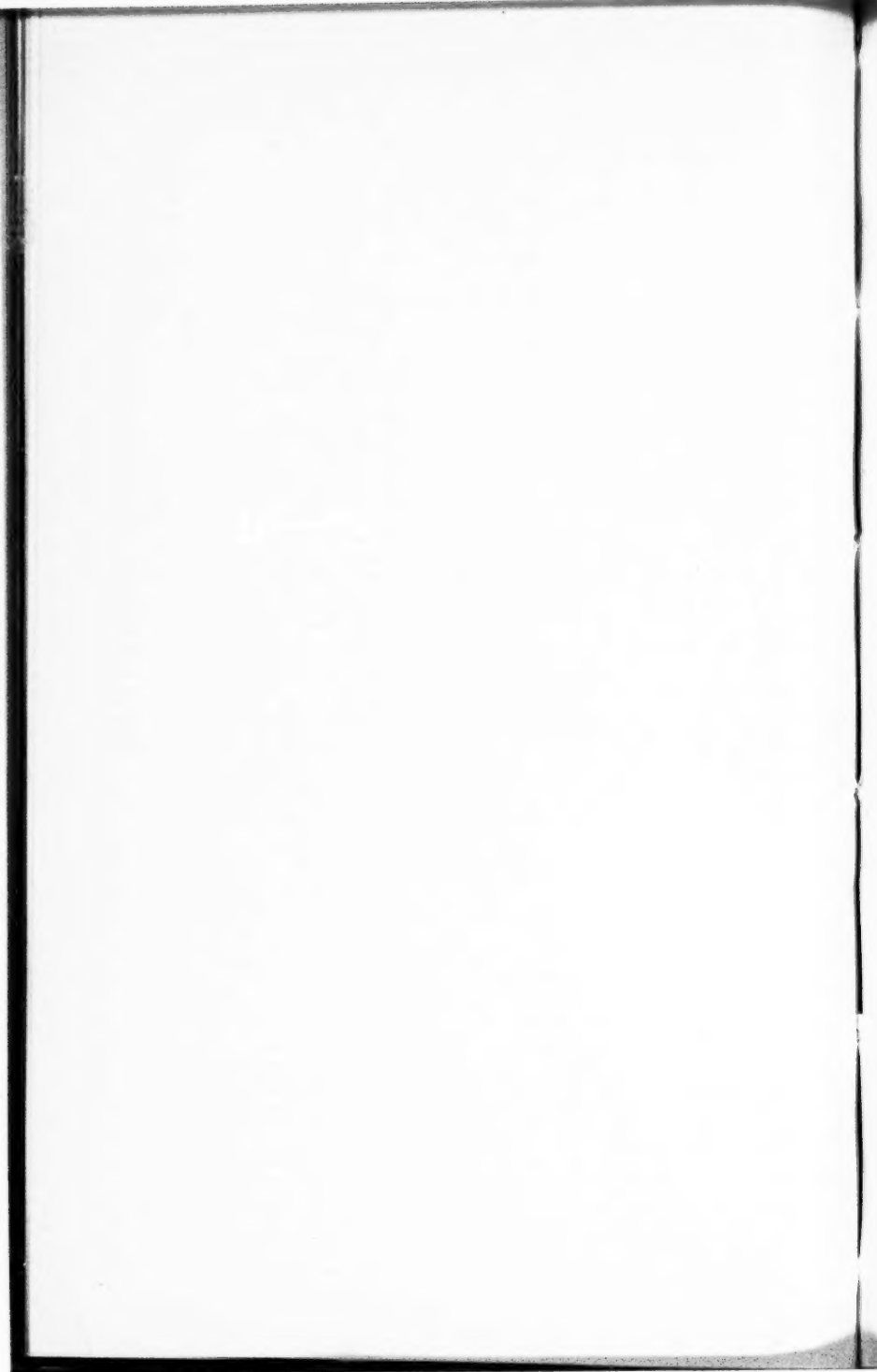
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TRANSCRIPT OF RECORD.

In the United States Circuit Court Appeals for the Sixth Circuit.

FRANK P. CHESBROUGH, Plaintiff in Error,

VS.

FRANK T. WOODWORTH, Defendant in Error.

Declaration.

(Filed March 31, 1908.)

UNITED STATES OF AMERICA,
State and Eastern District of Michigan, ss:

In the Circuit Court of the United States for the Eastern District of Michigan, Northern Division.

Frank T. Woodworth, of Bay City, Michigan, plaintiff herein, by Gillett & Clark and John C. Weadock, his attorneys, complains of Joseph W. McGraw, of Bay City, Michigan, and Frank P. Chesbrough of Detroit, Michigan, defendants herein, of a plead of trespass on the case, filing this declaration and rule to plead as commencement of suit.

First Count. For that whereas, heretofore, to-wit on the 13th day of February 1903, and for, to-wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the act of congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the City of Bay City, in the District and Division aforesaid.

And whereas, the act of Congress aforesaid being Section 5211 of the Compilation aforesaid, then and there provided for the making and publication by the said bank or reports exhibiting in
2 detail and under appropriate heads the resources and liabilities of the said bank upon certain dates specified by the Comptroller of the Currency, and required the truth of said reports to be attested by at least three of the directors of said bank.

And whereas, by necessary implication the said act of Congress then and there required that such reports, when made and published should contain a true statement of the condition of said bank, and the value of its resources, including its loans and discounts and of the amount of its surplus and undivided profits, so as to enable plaintiff as one of the public for whose information said reports were published to ascertain therefrom the value of its resources and of capital stock; and whereas by like implication said act of Congress prohibited the making and publishing of a false report.

And whereas, the said Act of Congress aforesaid being Section 5239 of the Compilation aforesaid then and there provided that if the directors of any national banking association should knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of said title, every director who participated in or assented to such violation should be held liable in his personal and individual capacity for all damages which any person should have sustained in consequence of such violation.

And whereas, the Comptroller of the currency had then and there specified the 6th day of February 1903, and had made requisition upon the said bank for a report of the resources and liabilities thereof upon the said day, as required by said act.

And plaintiff says that, it was then and there the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of said bank to violate and not to participate in or assent to violation of any of the provisions of the Act of Congress aforesaid.

And plaintiff says that the defendant, McGraw, disregarding his said duty, on to-wit the 11th day of February 1903, to-wit the 13th day of February, 1903, at to-wit the City of Bay City, aforesaid knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid, by signing, attesting and permitting and assenting to the publication of a false report of the resources and liabilities of the said bank and of its condition at the close of business on February 6, 1903; and that the said defendant Chesbrough, disregarding his said duty then and

3 there knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid, by permitting and assenting to the signing, attesting and publication of said report; which said report was in words and figures following, to-wit:

Report of the Condition of the Old Second National Bank at Bay City, in the State of Michigan, at the Close of Business February 6th, 1903.

Resources.

Loans and discounts.....	\$1,063,463.44
Overdrafts secured and unsecured.....	45.79
U. S. Bonds to secure circulation.....	200,000.00
Stocks, securities, etc.....	46,453.98
Banking house furniture and fixtures.....	2,500.00
Due from National Banks (not reserve agents)	\$1,012.59
Due from State banks and bankers.....	15,438.79
Due from approved reserve agents.....	160,320.24
Checks and other cash items.....	265.05
Exchanges for clearing house.....	3,201.50
Notes of other National Banks.....	6,250.00

Fractional paper currency, nickels and cents	75.84	
Lawful money reserve in bank, viz:		
Specie	33,272.00	
Legal tender notes	16,788.00	
		236,624.01
Redemption fund with U. S. Treasury, 5 per cent of circulation		10,000.00
		<hr/> \$1,559,087.13
Liabilities.		
Capital stock paid in	\$200,000.00	
Surplus fund	75,000.00	
Undivided profits less expense and taxes paid	27,802.38	
National Bank notes outstanding	200,000.00	
Due to other National Banks	\$14,553.87	
Due to State banks and bankers	69,966.72	
Dividends unpaid	10.00	
Individual deposits subject to check	372,835.72	
Demand certificates of deposit	498,918.44	
		956,284.75
Bills payable including certificates of deposit for money borrowed		100,000.00
Total		<hr/> \$1,559,087.13

4 STATE OF MICHIGAN,
County of Bay, ss:

I, M. M. Andrews, cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

M. M. ANDREWS, *Cashier.*

Subscribed and sworn to before me this 11th day of February, 1903.

CLAUD MARTIN,
Notary Public.

Correct attest:

J. W. McGRAW,
E. B. FOSS,
JAMES E. DAVIDSON,
Directors.

And plaintiff says that said report was printed and circulated on the 12th, 13th, 14th and 15th days of February 1903, in the Bay City Tribune, a public newspaper printed and circulated in the City of Bay City aforesaid.

And plaintiff says that the said report was knowingly false in this to-wit, that certain loans and discounts of said bank were listed in

said report as of the value of \$1,063,463.44, leaving an unimpaired capital; a surplus fund of \$75,000.00 and undivided profits less expenses and taxes paid of \$27,802.38, whereas in fact the said loans and discounts were worth and were known by the said defendants and each of them then and there to be worth much less than the value at which they were so listed, and much less than their face value and less than to-wit \$800,000.00; and the said item of loans and discounts included and was known by the said defendants and each of them to include commercial paper listed at or above its face value and known to be worth much less, to-wit \$200,000.00, less than its face value, thus materially affecting the value of the stock of said bank. And plaintiff says that the said report was knowingly false also in this to-wit, that the said bank had in fact no surplus fund and no undivided profits, and had lost a large part, to-wit, upwards of one-half of its capital.

And said plaintiff says that relying upon the truth of said report and in consequence of the concurrent violation by defendants of the provisions of the Acts of Congress aforesaid, plaintiff thereafter to-wit, on March 14th, May 26th, September 16th and December 16th, 1903 purchased to-wit 155 shares of the capital stock of said bank of the par value of to-wit, \$15,500.00 and paid therefor the sum of, to-wit, \$23,420.00, that being the apparent value thereof, as indicated by the report aforesaid whereas in fact the said stock was then and there of no value to plaintiff's damage of \$35,000.00 and therefore he brings suit.

Second Count. Also for that whereas, defendants heretofore, to-wit, on the 16th day of April, 1903, and for, to-wit, ten years prior thereto, at Bay City in the district and division aforesaid,

5 were directors of the Old Second National Bank, a National Banking corporation, under the circumstances and conditions, and subject to the provisions and requirements of the Acts of Congress described in the first four paragraphs of the first count hereof, which description and the paragraphs aforesaid are hereby referred to and made a part of this count.

And whereas, the Comptroller of the Currency had then and there specified the 9th day of April 1903, and had made requisition upon the said bank for a report of the resources and liabilities thereof upon the said day, as required by said act.

And plaintiff says that, it was then and there the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of said bank to violate and not participate in or assent to such violation of any of the provisions of the Act of Congress aforesaid.

And plaintiff says that the defendants and each of them, disregarding their said duty on, to-wit, the 10th day of April, 1903, to-wit the 16th day of April 1903, at to-wit, the City of Bay City, aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid by signing attesting and permitting and assenting to the publication of a false report of the resources and liabilities of the said bank and of its condition at the close of business on April

9th, 1903, which said report was in the words and figures following, to-wit:

Report of the Condition of the Old Second National Bank at Bay City, in the State of Michigan, at the Close of Business April 9th, 1903.

Resources.

Loans and discounts.....	\$985,738.34
Overdrafts secured and unsecured.....	333.47
U. S. Bonds to secure circulation.....	200,000.00
Stocks, securities, etc.....	46,453.98
Banking house furniture and fixtures.....	2,500.00
Due from National Banks (not reserve agents)....	1,377.15
Due from State banks and bankers.....	19,874.51
Due from approved reserve agents.....	122,923.60
Checks and other cash items.....	527.55
Exchanges for clearing house.....	2,974.39
Notes of other National Banks.....	5,790.00
Fractional paper currency, nickels and cents.....	161.67
Lawful money reserve in bank, viz.:	
Specie	44,137.00
Legal tender notes	14,750.00
	<hr/>
6 Redemption fund with U. S. treasurer 5 per cent of circulation	58,887.40
Due from U. S. Treasurer other than 5 per cent re- demption fund	10,000.00
	<hr/>
	1,800.00
Total.....	<hr/>
	\$1,459,282.06

Liabilities.

Capital Stock paid in.....	200,000.00
Surplus fund	75,000.00
Undivided profits less expenses and taxes paid.....	32,697.61
National Bank Notes outstanding.....	200,000.00
Due to other National Banks.....	16,373.46
Due to State Banks and bankers.....	38,952.62
Individual deposits subject to checks... 381,145.33	
Demand Certificates of deposit..... 515,113.04	
	<hr/>
	896,258.37
Total.....	<hr/>
	\$1,459,282.06

STATE OF MICHIGAN,

County of Bay, ss:

I, M. M. Andrews, cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

M. M. ANDREWS, *Cashier.*

Subscribed and sworn to before me this 10th day of April, 1903.
H. C. CHAPIN,
Notary Public.

Correct attest:

JAMES E. DAVIDSON,
J. W. McGRAW,
FRANK P. CHESBROUGH,
Directors.

And plaintiff says that said report was printed and circulated on the 14th, 15th and 16th days of April, 1903, in the Bay City Tribune, a public newspaper printed and circulated in the City of Bay City, aforesaid.

And plaintiff says that the said report was knowingly false in this to-wit, that certain loans and discounts of said bank were listed in said report as of the value of \$985,738.34, leaving an unimpaired capital; a surplus fund of \$75,000.00 and undivided profits less expenses and taxes paid of \$32,697.61, whereas in fact the said loans and discounts were worth and were known by the said defendants and each of them then and there to be worth much less than the value of which they were so listed, and much less than their face value and less than to-wit, \$800,000.00; and the said item of loans and discounts included and was known by the said defendants and each of them to include commercial paper listed at or about its face value

and known to be worth much less, to-wit, \$200,000.00 less
7 than its face value, thus materially affecting the value of the stock of said bank. And plaintiff says that the said report was knowingly false also in this, to-wit, that the said bank had in fact no surplus fund and no undivided profits, and had lost a large part, to-wit, upwards of one-half of its capital.

And plaintiff says that relying upon the truth of said report and in consequence of the concurrent violation by defendants of the provisions of the Acts of Congress aforesaid, plaintiff thereafter, to-wit, on the 26th day of May, the 16th day of September, and the 16th day of December, 1903, purchased to-wit 135 shares of the capital stock of said bank of the par value of to-wit \$13,500.00, and paid therefor the sum of to-wit \$20,220.00 that being the apparent value thereof, as indicated by the report aforesaid, whereas in fact the said stock was then and there of no value, to plaintiff's damage of \$30,000.00 and therefore he brings suit.

Third Count. Also for that whereas, defendants heretofore to-wit on the 13th day of June, 1903, and for to-wit, ten years prior thereto, at Bay City in the district and division aforesaid, were directors of the Old Second National Bank, a National Banking corporation, under the circumstances and conditions, and subject to the provisions and requirements of the Acts of Congress described in the first four paragraphs of the first count hereof, which description and the paragraph aforesaid are hereby referred to and made a part of this count.

And whereas, the Comptroller of the Currency had then and there specified the 9th day of June, 1903, and had made requisition

upon the said bank for a report of the resources and liabilities thereof upon the said day, as required by said act.

And plaintiff says that, it was then and there the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of said bank to violate and not to participate in or assent to such violation of any of the provisions of the Act of Congress aforesaid.

And plaintiff says that the defendant, McGraw disregarding his said duty, on to-wit the 12th day of June, 1903, to-wit the 13th day of June, 1903, at to-wit the City of Bay City aforesaid knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid by signing, attesting and permitting and assenting to the publication of a false report of the resources and liabilities of the said bank and of its condition at the close of business on June 9, 1903; and that the said

8 defendant Chesbrough, disregarding his said duty then and there knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid, by permitting and assenting to the signing, attesting and publication of said report; which said report was in the words and figures following, to-wit:

Report of the Condition of the Old Second National Bank, at Bay City, in the State of Michigan, at the Close of Business June 9th, 1903:

Resources.

Loans and discounts	\$989,363.47
Overdrafts secured and unsecured	15.54
U. S. Bonds to secure circulation	200,000.00
Stock securities, etc.	46,453.98
Banking house furniture and fixtures	2,500.00
Due from State Banks and bankers	25,952.58
Due from approved reserve agents	75,420.43
Checks and other cash items	71.87
Exchanges for clearing house	1,983.39
Notes of other National Banks	11,950.00
Fractional paper currency, nickels and cents	354.54

Lawful money reserve in bank, viz.,

Specie	36,809.00
Legal tender notes	14,760.00
	<hr/>
	51,569.00
Redemption fund with U. S. Treasurer 5 per cent of circulation	10,000.00
Due from U. S. Treasurer other than 5 per cent redemption fund	4,600.00
	<hr/>
Total	\$1,420,234.80

Liabilities.

Capital stock paid in	\$200,000.00
Surplus fund	75,000.00
Undivided profits less expense and taxes paid.....	30,357.75
National Bank notes outstanding.....	200,000.00
Due to other National banks.....	11,409.53
Due to State banks and bankers.....	39,728.77
Dividends unpaid	855.00
Individual deposits subject to check....	343,013.71
Demand certificates of deposit.....	519,870.04
	<hr/>
	862,883.75
Total.....	<hr/>
	\$1,420,234.80

STATE OF MICHIGAN,
County of Bay, ss:

I, M. M. Andrews, cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

9

M. M. ANDREWS, *Cashier.*

Subscribed and sworn to before me this 12th day of June, 1903.

H. C. CHAPIN,
Notary Public.

Correct attest:

JAMES DAVIDSON,
E. B. FOSS,
J. W. McGRAW,
Directors.

And plaintiff says that said report was printed and circulated on the 13th, 14th and 15th days of June, 1903, in the Bay City Tribune, a public newspaper printed and circulated in the City of Bay City, aforesaid.

And plaintiff says that the said report was knowingly false in this to-wit, that certain loans and discounts of said bank were listed in said report as of the value of \$989,363.47, leaving an unimpaired capital: a surplus fund of \$75,000.00 and undivided profits less expenses and taxes paid of \$30,357.75, whereas in fact the said loans and discounts were worth and were known by the said defendants and each of them then and there to be worth much less than the value at which they were so listed, and much less than their face value and less than to-wit, \$800,000.00; and the said item of loans and discounts included and was known by the said defendants and each of them to include commercial paper listed at or above its face value and known to be worth much less, to-wit, \$200,000.00, less than its face value, thus materially effecting the value of the stock of said bank. And plaintiff says that the said report was knowingly false also in this to-wit, that the said bank had in fact no surplus

fund and no undivided profits, and had lost a large part, to-wit, upwards of one-half of its capital.

And plaintiff says that relying upon the truth of said report and in consequence of the concurrent violation by defendants of the provisions of the Acts of Congress aforesaid, plaintiff thereafter to-wit; on September 16th, 1903, and December 16th, 1903, purchased to-wit 110 shares of the capital stock of said bank of the par value of to-wit \$11,000.00 and paid therefor the sum of to-wit \$16,270.00, that being the apparent value thereof, as indicated by the report aforesaid, whereas in fact the said stock was then and there of no value, to plaintiff's damage of \$25,000.00 and therefore he brings suit.

Fourth Count. Also for that whereas, defendants heretofore to-wit on the 14th day of September, 1903, and for, to-wit, ten years prior thereto, at Bay City, in the district and division aforesaid were directors of the Old Second National Bank, a National Banking corporation, under the circumstances and conditions, and
10 subject to the provisions and requirements of the Acts of Congress described in the first four paragraphs of the first count hereof, which description and the paragraphs aforesaid are hereby referred to and made a part of this count.

And whereas, the Comptroller of the Currency had then and there specified the 9th day of September, 1903, and had made requisition upon the said bank for a report of the resources and liabilities thereof upon the said day, as required by said act.

And plaintiff says that, it was then and there the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of said bank to violate and not to participate in or assent to such violation of any of the provisions of the Act of Congress aforesaid.

And plaintiff says that the defendant McGraw, disregarding his said duty on to-wit, the 12th day of September, 1903, to-wit, the 14th day of September, 1903, at to wit, the city of Bay City aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid, by signing, attesting and permitting and assenting to the publication of a false report of the resources and liabilities of the said bank of its condition at the close of business on September 9th, 1903, and that the said defendant, Cresbrough, disregarding his said duty then and there knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress, aforesaid by permitting and assenting to the signing, attesting and publication of said report; which said report was in the words and figures following, to-wit:

Report of the Condition of the Old Second National Bank, at Bay City, in the State of Michigan, at the Close of Business September 9th, 1903.

Resources.

Loans and discounts	\$937,490.77
Overdrafts secured and unsecured	2,428.87
U. S. Bonds to secure circulation	200,000.00
Stocks, securities, etc.	46,953.98
Banking house furniture and fixtures	2,500.00
Due from state banks and bankers	15,081.17
Due from approved reserve agents	159,621.14
Checks and other cash items	202.59
Exchanges from clearing house	11,532.03
Notes of other National Banks	7,460.00
Fractional paper cur-ency, nickles and cents	398.83
11 Lawful money reserve in bank, viz:	
Specie	44,093.00
Legal tender notes	8,695.00
	<hr/> 52,788.00
Redemption fund with U. S. Treasurer 5 per cent of circulation	10,000.00
Total	<hr/> \$1,446,457.38

Liabilities.

Capital stock paid in	200,000.00
Surplus fund	75,000.00
Undivided profits less expense and taxes paid	34,530.20
National Bank notes outstanding	200,000.00
Due to other National Banks	12,604.53
Due to State Banks and bankers	46,173.36
Dividends unpaid	10.00
Individual deposits subject to check	380,554.16
Demand certificates of deposit	497,585.13
	<hr/> 878,139.29
Total	<hr/> \$1,446,457.38

STATE OF MICHIGAN,
County of Bay, ss:

I, M. M. Andrews, cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

M. M. ANDREWS, *Cashier.*

Subscribed and sworn to before me this 12th day of September, 1903.

H. C. CHAPIN,
Notary Public.

Correct attest:

FREMONT B. CHESBROUGH,
J. W. McGAW,
JAMES DAVIDSON,
Directors.

And plaintiff says that said report was printed and circulated on the 13th, 15th and 16th days of September, 1903, in the Bay City Tribune, a public newspaper printed and circulated in the City of Bay City, aforesaid, and on the 14th and 15th days of September, 1903, in the Bay City Times, a public newspaper printed and circulated in the City of Bay City, aforesaid, the said report as printed in the Bay City Tribune of September 16th, 1903, purporting to have been attested by defendant Frank P. Chesbrough instead of Fremont B. Chesbrough.

And plaintiff says that the said report was knowingly false in this to-wit, that certain loans and discounts of said bank were listed in said report as of the value of \$937,490.77, leaving an unimpaired capital; a surplus fund of \$75,000.00 and undivided profit less expenses and taxes paid of \$34,530.20 whereas in fact the said loans and discounts were worth and were known by the said defendants

and each of them then and there to be worth much less than
12 the value at which they were so listed, and much less than their face value and less than to-wit \$750,000.00; and the said item of loans and discounts included and was known by the said defendants and each of them to include commercial paper listed at or above its face value and known to be worth much less, to-wit, \$200,000.00 less than its face value, thus materially affecting the value of the stock of said bank. And plaintiff says that the said report was knowingly false also in this to-wit, that the said bank had in fact no surplus fund and no undivided profits, and had lost a large part, to-wit, upwards of one-half of its capital.

And plaintiff says that relying upon the truth of said report and in consequence of the concurrent violation by defendant of the provisions of the Acts of Congress aforesaid, plaintiff thereafter to-wit, on September 16, 1903, and December 16, 1903, purchased to-wit 110 shares of the capital stock of said bank of the par value of to-wit \$11,000.00 and paid therefor the sum of to-wit \$16,270.00 that being the apparent value thereof, as indicated by the report aforesaid, whereas in fact the said stock was then and there of no value to plaintiff's damage of \$25,000.00 and therefore he brings suit.

Fifth Count. Also for that whereas, defendants heretofore, to-wit, on the 24th day of November, 1903, and for, to-wit, ten years prior thereto, at Bay City in the district and division aforesaid, were directors of the Old Second National Bank, a National Banking corporation, under the circumstances and conditions, and subject to the provisions and requirements of the Acts of Congress described in

the first four paragraphs of the first count hereof, which description and the paragraph aforesaid are hereby referred to and made a part of this count.

And, whereas, the Comptroller of the Currency had then and there specified the 17th day of November, 1903, and had made requisition upon the said bank for a report of the resources and liabilities thereof upon the said day, as required by said act.

And plaintiff says that it was then and there the duty of said defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of said bank to violate and not to participate in or assent to such violation of any of the provisions of the Act of Congress aforesaid.

And plaintiff says that the defendants and each of them disregarding their duty on, to-wit, the 21st day of November, 1903, to-wit, the 24th day of November, 1903, at, to-wit, the City of Bay City,

13 aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid, by signing, attesting, and permitting and assenting to the publication of a false report of the resources and liabilities of the said bank and of its condition at the close of business on November 17th, 1903, which said report was in words and figures following, to-wit:

Report of the Condition of the Old Second National Bank, at Bay City in the State of Michigan, at the Close of Business November 17th, 1903.

Resources.

Loans and discounts.....	\$1,081,446.05
Overdrafts secured and unsecured.....	1.39
U. S. Bonds to secure circulation.....	200,000.00
Stocks, securities, etc.....	66,953.98
Banking house furniture and fixtures.....	2,500.00
Due from National Banks (not reserve agents).....	902.18
Due from state banks and bankers.....	9,570.95
Due from approved reserve agents.....	83,891.37
Checks and other cash items.....	462.52
Exchanges for clearing house.....	5,969.71
Notes of other National Banks.....	7,965.00
Fractional paper currency, nickels and cents.....	528.78
Lawful money reserve in bank, viz:	
Specie.....	40,715.00
Legal tender notes.....	15,630.00
	56,345.00
Redemption fund with U. S. Treasurer 5 per cent of circulation.....	10,000.00
Total.....	\$1,526,536.93

Liabilities.

Capital stock paid in.....	200,000.00
Surplus fund	75,000.00
Undivided profits less expense and taxes paid.....	40,773.26
National Bank notes outstanding.....	200,000.00
Due to other National Banks.....	13,386.77
Due to State banks and bankers.....	42,837.80
Individual deposits subject to check.... 400,837.54	
Demand certificates of Deposit..... 503,701.56	
	<hr/>
	904,539.10
Bills payable including certificates of deposit for money borrowed	50,000.00
	<hr/>
Total	\$1,526,536.93

STATE OF MICHIGAN,
County of Bay, ss:

I, M. M. Andrews, cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

M. M. ANDREWS, *Cashier.*

14 Subscribed and sworn to before me this 21st day of November, 1903.

H. C. CHAPIN,
Notary Public.

Correct attest:

FRANK P. CHESBROUGH,
J. W. MCGRAW,
E. B. FOSS,
Directors.

And plaintiff says that said report was printed and circulated on the 22nd and 24th days of November, 1903, in the Bay City Tribune and on the 23rd day of November, 1903, in the Bay City Times, both of which were public newspapers printed and circulated in the City of Bay City aforesaid.

And plaintiff says that the said report was knowingly false in this to-wit, that certain loans and discounts of said bank were listed in said report as of the value of \$1,081,446.05, leaving an unimpaired capital; a surplus fund of \$75,000.00 and undivided profits less expenses and taxes paid of \$40,773.26, whereas in fact the said loans and discounts were worth and were known by the said defendants and each of them then and there to be worth much less than the value at which they were so listed, and much less than their face value and less than, to-wit, \$800,000.00 and the said item of loans and discounts included and was known by the said defendants and each of them to include commercial paper listed at or above its face value and known to be worth much less, to-wit, \$200,000 less than its face value thus ma-

terially affecting the value of the stock of said bank. And plaintiff says that the said report was knowingly false also in this, to-wit, that the said bank had in fact no surplus fund and no undivided profits, and had lost a large part, to-wit, upwards of one-half of its capital.

And plaintiff says that relying upon the truth of said report and in consequence of the concurrent violation by defendants of the provisions of the Acts of Congress aforesaid, plaintiff thereafter, to-wit, on the 16th day of December, 1903, purchased, to-wit, eighty shares of the capital stock of said bank of the par value of, to-wit, \$8,000.00 and paid therefor the sum of, to-wit, \$11,620.00 that being the apparent value thereof, as indicated by the report aforesaid, whereas in fact the said stock was then and there of no value, to plaintiff's damage of \$20,000.00 and therefore he brings suit.

Sixth Count. Also for that whereas, heretofore, to-wit, on the first day of December, 1902, and for, to-wit, ten years prior thereto defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the Act of Congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having
15 its banking office at the City of Bay City, in the District and Division aforesaid.

And whereas, the Acts of Congress aforesaid, being Sections 5199 and 5204 of the Compilation aforesaid, provided that dividends declared upon the capital stock of any National Banking association should be declared out of the net profits thereof, and that neither any such association nor any of its members should withdraw or permit to be withdrawn either in the form of dividends or otherwise any portion of its capital and that if losses had at any time been sustained by any such association equal to or exceeding its undivided profits then on hand, no dividends should be made.

And whereas it was thereby further provided that no dividend should ever be made by any such association while it continued its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts.

And whereas, the said Act of Congress aforesaid, being Section 5239 of the Compilation aforesaid, then and there provided that if the directors of any national banking association should knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of said title, every director who participated in or assented to such violation should be held liable in his personal and individual capacity for all damages which any person should have sustained in consequence of such violation.

And whereas, the defendants and each of them then and there knew that the payment of dividends on the stock of said bank, would be understood and accepted by all persons contemplating business transactions in regard to the stock of said bank, as an assurance and representation that the capital of said bank was unimpaired and that the said stock was worth its par value and upwards and that no losses had been sustained equal to or exceeding its undivided profits then

on hand, and that its net profits then on hand after deducting therefrom its losses and bad debts, equalled or exceeded the sums so declared as dividends.

And plaintiff says that thereupon it was the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents, or servants of the said bank to violate and not to participate in or assent to such violation of any of the provisions of the Acts of Congress, aforesaid, in respect to the declaration of dividends, as aforesaid.

And plaintiff says that the said defendants and each of them disregarding their said duty on, to-wit, the first day of December, 1902, at, to-wit, the City of Bay City, aforesaid, knowingly violated
16 and knowingly participated in, permitted and assented to the violation of the provisions of the Acts of Congress aforesaid in that they and each of them participated in, voted for, permitted and assented to the declaration of a semi-annual dividend of five per cent on the capital stock of said bank, said dividend being payable on, to-wit, December 1st, 1902, knowing that the said dividend would necessarily be paid out of the capital stock of said bank and not out of the net profits, and knowing that losses had theretofore been sustained equal to or exceeding its undivided profits then on hand, and that the sums so declared as dividends exceeded its net profits then on hand, after deducting therefrom its losses and bad debts.

And plaintiff says that relying upon the belief that by reason of the declaration of the dividend aforesaid, the capital stock of the said bank was unimpaired and that said dividend had been declared out of and did not exceed its net profits then on hand after deducting therefrom its losses and bad debts and that losses had not been sustained by said bank exceeding its undivided profits; plaintiff thereafter on, to-wit, March 14th, 1903, May 26th, 1903, September 16th, 1903, and December 16th, 1903, purchased to-wit 155 shares of the capital stock of said bank of the par value of \$15,500.00, paying therefor the sum of, to-wit, \$23,420.00, which said sum was the fair and reasonable value thereof if the said dividend of five per cent had in fact been paid out of the net profits of the said bank for the six months next preceding the declaration of said dividend, but which said stock was in fact of no value, wherefore in consequence of the concurrent violation by defendants of the provisions of said Act of Congress aforesaid, plaintiff sustained damages in the sum of \$35,000 and therefore he brings suit.

Seventh Count. Also for that whereas, heretofore, to-wit, on the first day of June, 1903, and for, to-wit, ten years prior thereto at Bay City in the District and Division aforesaid, defendants were directors of the Old Second National Bank, a national banking corporation under the circumstances and conditions and subject to the provisions and requirements of the Acts of Congress described in the first five paragraphs of the sixth count hereof, which description and the paragraphs aforesaid are hereby referred to and made a part of this count.

And plaintiff says that thereupon it was the duty of defendants and each of them not to knowingly violate or knowingly permit any

of the officers, agents or servants of the said bank to violate and not to participate in or assent to such violation of any of the provisions of the Acts of Congress, aforesaid, in respect to the declaration of dividends, as aforesaid.

17 And plaintiff says that the said defendants and each of them disregarding their said duty on, to-wit, the 29th day of May, 1903, to-wit, the first day of June, 1903, — to-wit, the City of Bay City, aforesaid, knowingly violated and knowingly participated in, permitted and assented to the violation of the provisions of the Acts of Congress aforesaid in that they and each of them participated in, voted for, permitted and assented to the declaration of a semi-annual dividend of five per cent on the capital stock of said bank, said dividend being payable on, to-wit, June 1st, 1903, knowing that the said dividend would necessarily be paid out of the capital stock of said bank and not out of the net profits, and knowing that losses had theretofore been sustained equal to or exceeding its undivided profits then on hand, and that the sums so declared as dividends exceeded its net profits then on hand, after deducting therefrom its losses and bad debts.

And plaintiff says that relying upon the belief that by reason of the declaration of the dividend aforesaid, the capital stock of the said bank was unimpaired and that said dividend had been declared out of and did not exceed its net profits then on hand after deducting therefrom its losses and bad debts and that losses had not been sustained by said bank exceeding its undivided profits; plaintiff thereafter on, to-wit, September 16th, 1903, and December 16th, 1903, purchased, to-wit, 110 shares of the capital stock of said bank of the par value of \$11,000.00, paying therefor the sum of \$16,270.00, which said sum was the fair and reasonable value thereof if the said dividend of five per cent had in fact been paid out of the net profits of the said bank for the six months next preceding the declaration of said dividend, but which said stock was in fact of no value, wherefore in consequence of the concurrent violation by the defendants of the provisions of said Act of Congress aforesaid, plaintiff sustained damages in the sum of \$25,000.00 and therefore he brings suit.

Eighth Count. Also for that whereas, heretofore, to-wit, on the first day of December, 1903, and for, to-wit, ten years prior thereto at Bay City in the District and Division aforesaid defendants were directors of the Old Second National Bank, a national banking corporation, under the circumstances and conditions and subject to the provisions and requirements of the Acts of Congress described in the first five paragraphs of the sixth count hereof, which description and the paragraphs aforesaid are hereby referred to and made a part of this count.

And plaintiff says that thereupon it was the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents, or servants of the said bank to violate and

not participate in or assent to such violation of any of the provisions of the Acts of Congress, aforesaid, in respect to the declaration of dividends, as aforesaid.

18 And plaintiff says that the said defendants and each of them

disregarding their said duty on, to-wit, the 27th day of November, 1903, to-wit, the first day of December, 1903, at, to-wit, the City of Bay City, aforesaid, knowingly violated and knowingly participated in, permitted and assented to the violation of the provisions of the Acts of Congress aforesaid, in that they and each of them participated in, voted for, permitted and assented to the declaration of a semi-annual dividend of five per cent on the capital stock of said bank, said dividend being payable on, to-wit, December 1st, 1903, knowing that the said dividend would necessarily be paid out of the capital stock of said bank and not out of the net profits, and knowing that losses had therefore been sustained equal to or exceeding its undivided profits then on hand, and that the sums so declared as dividends exceeded its net profits then on hand, after deducting therefrom its losses and bad debts.

And plaintiff says that relying upon the belief that by reason of the declaration of the dividend aforesaid, the capital stock of the said bank was unimpaired and that said dividend had been declared out of and did not exceed its net profits then on hand after deducting therefrom its losses and bad debts and that losses had not been sustained by said bank exceeding its undivided profits; plaintiff thereafter on, to-wit, December 16th, 1903, purchased, to-wit, 80 shares of the capital stock of said bank of the par value of \$8,000.00, paying therefor the sum of \$11,620.00 which said sum was the fair and reasonable value thereof if the said dividend of five per cent had in fact been paid out of the net profits of the said bank for the six months next preceding the declaration of said dividend, but which said stock was in fact of no value, wherefore in consequence of the concurrent violation by defendants of the provisions of said Act of Congress aforesaid, plaintiff sustained damages in the sum of \$20,000.00 and therefore he brings suit.

Ninth Count. Also for that, whereas, heretofore, to-wit, on the 16th day of December, 1903, and for, to-wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the Act of Congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the City of Bay City, in the District and Division aforesaid.

And whereas, the Act of Congress aforesaid being Section 5200 of the Compilation aforesaid, then and there provided that the
 19 total liabilities to the bank of any person, company, corporation or firm for money borrowed (not including the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same) should at no time exceed one-tenth part of the amount of the capital stock of said bank actually paid in.

And whereas, the capital stock of the said bank actually paid in was then and there the sum of \$200,000.00.

And whereas, the defendants and each of them then and there

knew that the creation and continuance of liabilities in violation of the section aforesaid and the carrying of the same among the loans and discounts of the said bank, would mislead and deceive the plaintiff as a member of the public, and would cause the published reports of said bank to present to the plaintiff as a member of the public, a false and misleading representation in regard to the nature of said loans and discounts, and that plaintiff as a member of the public had the right to rely upon the belief that the loans and discounts of said bank contained no liabilities which were created or permitted to continue in knowing violation of the section aforesaid.

And plaintiff says it was then and there the duty of the said defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate and not to participate in or assent to such violation of any of the provisions of the section last aforesaid.

And plaintiff says that the defendants and each of them at, to-wit, the time and place aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the said section in this, to-wit, that they knowingly participated in, permitted, and assented to the creation of certain liabilities to the said bank in violation of the section aforesaid and knowingly permitted and assented to the continuance of the said liabilities and the carrying of the same among the loans and discounts of the said bank after defendants and each of them had knowledge of the nature and character of the liabilities aforesaid, and that they had been created and were being carried in violation of the section aforesaid. And plaintiff says that the liabilities aforesaid were as follows, to-wit, of one Alzina Maltby, doing business as the Maltby Lumber Company, Bay City, Michigan, the sum of, to-wit, \$200,000.00, and of Willard L. Brotherton, Henry N. Watrous and Henry W. Jennison, copartners doing business under the firm name of W. I. Brotherton & Company, of Bay City, Michigan, the sum of, to-wit, \$50,000.00, said liabilities being in excess of and not consisting of or created by the discount of bills of exchange drawn in good faith against actually existing values or the discount of commercial or

20

business paper actually owned by the person negotiating the same. And plaintiff says that the said Alzina Maltby and the said Willard L. Brotherton and others doing business as W. I. Brotherton & Company, were on, to-wit, the first day of January, 1903, and thereafter insolvent, and that by reason of the violation of the section aforesaid, the said bank then and thereafter during the entire year 1903, carried among its loans and discounts liabilities of the said Alzina Maltby and of the said W. I. Brotherton & Co., of the face value of, to-wit, \$200,000.00 which were then and there of no value and were thereafter charged off to profit and loss upon the books of said bank. That by reason of the premises and in consequence of the concurrent violation by the defendants of the section aforesaid in the manner aforesaid, the published reports of the said bank during the entire year 1903, presented to the public, including this plaintiff false and misleading representations in regard to the condition of the said

bank, the value of its resources, the amount of its surplus and undivided profits and the value of its capital stock.

And plaintiff says that in reliance upon the belief that the loans and discounts of said bank as listed in its published reports during the year 1903 included no liabilities knowingly created or knowingly permitted to continue in violation of the section aforesaid, plaintiff on to-wit, March 14, 1903, May 26, 1903, September 16, 1903, and December 16, 1903, purchased to-wit 155 shares of the capital stock of the said bank of the par value to-wit, \$15,500.00 and paid therefor the sum of to-wit \$23,420.00 which would have been the fair and reasonable value thereof if the said defendants had not violated the section aforesaid in the manner aforesaid, but which said stock was in fact of no value by reason whereof and in consequence of the concurrent violation by defendants of the section aforesaid, in the manner aforesaid plaintiff suffered damages in the sum of \$35,000.00 and therefore he brings suit.

Tenth Count. Also, for that whereas, defendants heretofore to-wit on the 16th day of December 1903, and for to-wit ten years prior thereto at Bay City in said district, were directors of the Old Second National Bank, a national banking corporation and were charged with and subject to certain duties and liabilities under sections 5199, 5200, 5204, 5211 and 5239 of Title 62 of the United States Compiled Statutes of the Compilation of 1901, as is fully and particularly referred to and described in the preceding counts of this declaration which said counts are hereby referred to and made a part of this count.

21 And plaintiff says that the said defendants acting jointly and concurrently, knowingly violated and knowingly participated in, permitted and assented to the violation of the several provisions of the acts of Congress aforesaid, in the several ways and under the several circumstances set forth in the preceding counts of this declaration which are hereby made a part of this count, all of said violations and permitted violations being portions of a general design and conspiracy on the part of the said defendants to deceive the public including this plaintiff, for the purpose of giving the stock of the said bank a fictitious market value and enabling each of the defendants and his relatives and friends to dispose of certain shares of the said stock, then and there held by them, at a price exceeding their true value.

And plaintiff says that he was deceived and misled by and relied upon the acts and omissions of the defendants as aforesaid, by reason whereof and in consequence of the violation by defendants of the acts of Congress aforesaid, plaintiff on to wit, March 14, 1903, May 26, 1903, September 16, 1903, and December 16, 1903, purchased, to-wit, 155 shares of the capital stock of said bank for the par value of to-wit, \$15,500.00 and paid therefor the sum of \$23,420.00 which said sum was the apparent value thereof and would have been the true value thereof if it had not been for the violation by the defendants of the Acts of Congress aforesaid, but which said stock was

in fact of no value, to plaintiff's damage of \$35,000.00 and therefore he brings suit.

GILLETT & CLARK,
Business Address, Shearer Bldg., Bay City, Mich.;
JOHN C. WEADOCK,
Business Address, 7 Wall St., New York City,
Attorneys for Plaintiff.

Demurrer of Defendant, Frank P. Chesbrough.

(Filed April 16, 1908.)

The defendant, Frank P. Chesbrough, comes by his attorney, Thomas A. E. Weadock, and demurs to the declaration of the plaintiff in this case; and for causes of demurrer shows:

First. That said declaration as a whole sets out no cause of action against this said defendant upon which said plaintiff can recover.

Second. This defendant demurs to each count in said declaration on the ground that the plaintiff has not alleged facts therein which entitle him to recover against this defendant.

Third. This defendant demurs to the first count of said declaration because it does not charge any violation of the National Banking Act, except "by signing, attesting and permitting and assenting to the publication of a false report of the resources and liabilities of said bank," without showing that said defendant had anything to do with the making up of said report, or knew that it was false in any particular, which report, as set forth in said declaration, shows that it was sworn to by the cashier of the Old Second National Bank, whom the directors had the right to assume was honest and faithful, before it was attested, if at all by this defendant, and it does not allege that defendant did anything maliciously or fraudulently.

Fourth. Said defendant Chesbrough demurs to the second count for the same reasons as alleged in regard to the first count.

Fifth. Said defendant Chesbrough demurs to the third count, because said count is against defendant McGraw alone, and is alleged to be based on the report of June 9th, 1903, which purports to have been signed by defendant McGraw, James E. Davidson and Edgar B. Foss.

Sixth. Said defendant demurs to the fourth count of said declaration, which is based on the report of September 9th, 1903, said declaration showing that it was not attested by defendant Chesbrough, but was attested by Fremont B. Chesbrough, a brother of defendant Frank P. Chesbrough, and a director of said bank, and also by defendant McGraw, and James Davidson.

Seventh. Said defendant demurs to the fifth count of said declaration, based on the report of November 17th, 1903, which is alleged to have been attested by said defendants Chesbrough, and McGraw and Edgar B. Foss, for the reason that it does not state a cause of action against this defendant, and does not show that the report

23 complained of was not exactly in form and fact as required by law.

Eighth. This defendant demurs to the sixth count of said declaration referring to the dividend of December 1st 1902, for the reason that it does not state a cause of action. Defendant is not liable at law for an error in judgment, no bad faith being charged.

Ninth. Defendant demurs in like manner and for the same reason to the seventh and eighth counts of said declaration. Knowledge of all the affairs of a bank, or what its books and papers would show, cannot be imputed to a director for the purpose of charging him with liability.

Tenth. This defendant demurs to the ninth count of said declaration for the reason that it does not state a cause of action against this defendant. It states merely conclusions and not facts. Directors are not responsible for bad debts made by the cashier or other officer of the bank.

Eleventh. This defendant demurs to the tenth count of said declaration because it does not state a cause of action, and because even if it did state a cause of action, that right, if any, inured to the stockholders of said bank and not to plaintiff.

Twelfth. Said declaration does not allege that the Old Second National Bank is not now, and has not been uninterruptedly since its organization prior to 1902, a going concern, in the full exercise of its functions as a national bank; and the fact that the said bank continued to do business uninterruptedly as aforesaid by the knowledge and consent of the Comptroller of the Currency of the United States, is a determination of the Comptroller of the Currency of the United States, charged by law with the supervision and control of national banks, that the allegations in said declaration cannot be maintained.

Thirteenth. Said declaration nowhere alleges that said bank has not been examined from time to time by the national bank examiners of the United States, who have duly reported their findings to the Comptroller of the Currency, who has decided all the questions raised by said reports in favor of said bank, which decisions, under the law, cover the questions raised in said declaration.

Fourteenth. Because said declaration does not negative the fact that the plaintiff was a stockholder of said bank during all the time in question and does not show that he did not receive and retain his share of the dividends complained of.

Fifteenth. Because said defendant as one director, not both defendants as two of the seven directors of said bank could not charge off any paper of said bank as bad, nor could one or two directors declare dividends, and said declaration does not allege that the action of said defendant Chesbrough, or either defendant, prevented any

24 paper being charged off, not that at the time alleged in said declaration that either of said directors, or said board of seven directors of said bank, knew or believed that said paper should be charged off.

Sixteenth. This defendant demurs to the tenth count of said

declaration because at least three persons are necessary to form a conspiracy.

Seventeenth. This defendant demurs to said declaration because it nowhere appears that said defendant acted negligently in signing said reports, nor that defendant and the board of directors of said bank did not employ honest and faithful agents, servants and employees; a competent and honest cashier, and honest bookkeepers; and nothing more is charged against them than attesting by their signatures certain reports prepared by the officers, agents, and employees of said bank; without knowledge, participation or direction of this defendant which reports had been sworn to by the cashier of said bank before their attestation.

Eighteenth. Because this defendant is nowhere charged, in the first five counts of said declaration, with doing anything more than "knowingly" signing certain reports, and is not charged with preparing said reports, nor with knowing them to be false;

Wherefore this defendant demurs and prays judgment of the court on each and all of the grounds of demurrer herein taken.

THOMAS A. E. WEADOCK,
Attorney for Frank P. Chesbrough.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

Detroit, April 11th, 1908.

THOMAS A. E. WEADOCK,
Of Counsel for Defendant Chesbrough.

To Gillett & Clark, attorneys for plaintiff.

GENTLEMEN: Please take notice that the foregoing is a copy of the demurrer of defendant Frank P. Chesbrough duly filed herein.

THOMAS A. E. WEADOCK,
Attorney for said Defendant.

Business Address: Hammond Building, Detroit, Michigan.

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Order Overruling Demurrer.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment *as* the District Court room in the City of Bay City, on Saturday the thirteenth day of February, in the year one thousand nine hundred and nine.

Present: The Honorable Henry H. Swan, District Judge.

The demurrer filed by defendant- to plaintiff's declaration, heretofore argued by counsel for respective parties, and submitted, *are*, after due deliberation thereon, by the court now overruled with leave to defendants to plead over within ten days from this day according to the rules and practice of this court.

Bill of Particulars.

(Filed March 10, 1909.)

"Plaintiff's bill of particulars (consisting of 56 pages) contained an itemized list of the Maltby and Brotherton paper held by the Old Second National Bank on the following dates, viz., February 6th, 1903; April 9th, 1903; June 9th, 1903; September 9th, 1903; and November 17th, 1903."

Plea of General Issue, with Notice.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Michigan, Northern Division.

FRANK T. WOODWORTH, Plaintiff,

vs.

JOSEPH W. MCGRAW and FRANK P. CHESBROUGH, Defendants.

Plea of Defendant Chesbrough.

The defendant, Frank P. Chesbrough, for plea to the several counts of the declaration, says he is not guilty of the wrongs and injuries complained of in plaintiff's several counts of his declaration, and avers that plaintiff is not entitled to a recovery.

And for a further plea in this behalf, said defendant says that plaintiff's cause of action, if any he had, accrued more than five years before the commencement of this suit, and this said defendant is ready to verify.

THOMAS A. E. WEADOCK,
Attorney for Defendant Chesbrough.

And for a further plea, this defendant says that if any act of his caused damage to said Second National Bank, the right of action therefor, if any, was an asset of said Bank and cannot be recovered by plaintiff as an individual stockholder suing for his own benefit.

THOMAS A. E. WEADOCK,
Attorney for Defendant Chesbrough.

And for a further plea to the third and fourth counts of the declaration, the said defendant says that it appears by said declaration that he did not sign either of said reports and for that reason among others, he is not liable.

THOMAS A. E. WEADOCK,
Attorney for Defendant Chesbrough.

To Gillett & Clark, attorneys for plaintiff.

SIRS: Please take notice that the defendant, Frank P. Chesbrough, will on the trial of this case insist and give in evidence under the general issue above pleaded, that the Second National Bank of Bay City, referred to in plaintiff's declaration, was organized and had its existence under and by virtue of the National Banking Act passed and approved by the Congress of the United States, being secs. 5133 et seq. of the revised statutes of the United States.

That Orrin Bump, James Davidson and his successor, James E. Davidson, were the presidents of said bank, and Orrin Bump and M. M. Andrews were the cashiers of said bank during the period in question; that said bank was managed by a board of seven directors; that each of the defendants herein was a director of said bank, and that the aforesaid Orrin Bump departed this life on the 4th day of October, 1907.

That no forfeiture of the franchise of the said banking association has ever been declared by the Comptroller of the Currency of the United States or adjudged by any Court, for reason of the violation of any of the provisions of the National Banking Act by the directors and officers of said Bank, or for any other reason. That said Bank has done business at Bay City continuously since its organization and is still doing business.

This defendant denies that he knowingly signed or attested any incorrect report set out and referred to in the said declaration, and denies that he made, signed or attested any report purporting to show the condition of said Bank for the purpose and in the manner alleged in the plaintiff's declaration.

That said plaintiff was employed for years prior to his purchase of stock in the Second National Bank at Bay City, described in said declaration, and was entirely familiar with the manner in said Bank of making reports to the Comptroller of the Currency, and knew that the directors who signed said reports from time to time relied upon the statements on oath of the cashier that he believed said statements were correct, and other officers of the Bank who prepared said statements, that they were correct.

That said defendant in this cause relied on the oath of the cashier and the honesty, ability and integrity of the officers, agents and employees of said Bank, and without any knowledge of anything to the contrary, signed the statements in good faith, believing them to be correct, as plaintiff signed the statements of said Bank to said Comptroller dated January 17th. and May 29th, 1905.

That said plaintiff purchased the stock mentioned in his declaration, of brokers, at his own instance and for the purpose of acquiring a majority of the stock of said Bank by himself and other parties acting with him, in order to get control of the majority of the stock of said Bank and thereby procure his election to the board of directors and to the presidency of said Bank.

That said plaintiff was employed in said Bank as collection clerk for about two and one-half years and was then check and deposit book-keeper for the remainder of the time he was in said Bank; that

in his business career he was a member of the firms of Slater & Woodworth and Smalley & Co., in which he was a partner, and later Smalleys & Woodworth, which firm was formed in 1890 and lasted until 1897, after which the firm was known as Woodworth & Company, all of which firms kept their accounts, discounted their paper, and did all their banking business at said Second National Bank.

That said plaintiff kept his own account and the accounts of the different firms in which he was interested from time to time for the past twenty-five years continuously in the said Bank, and knew the general history of the same, and knew of the losses sustained by the said Bank on the notes and bills mentioned in his bill of particulars, and he had this knowledge long before he purchased any of the stock of said Bank, mentioned in his declaration.

That for thirty years continuously prior to January 1st, 1903, said plaintiff resided in Bay City, and was personally acquainted with the officers and employees of said Second National Bank; that he knew they were men of integrity and high character, and one of them was his near relative and another a relative of his wife, and all of them were his near neighbors and daily associates; that in purchasing the stock of said Bank, he relied upon his own knowledge of the condition of said Bank, and of the men who then composed its board of directors, and who were its executive officers, and he did not rely upon the printed statements set up in his declaration, nor any of them.

That plaintiff's father-in-law, James S. Smalley, who lived in his family, had been a stockholder in said Bank three or four years before he bought stock therein. That in October, 1904, said plaintiff was appointed a member of an investigating committee to look into the affairs of said Bank, and acted as such, after which, as a director of said Bank, he attested as correct by signing his name thereto, the statement of said Bank to the Comptroller of the Currency made January 17th, 1905, which was duly published, at which time said plaintiff knew that said Bank held said Maltby paper to the amount of \$276,000.00, which he knew had not been charged off, and which amount he, also, knew was included in the item of "loans and discounts" in said report, at which time said Bank held all the paper mentioned in plaintiff's declaration and bill of particulars.

That on May 29th, 1905, said plaintiff attested as correct, by his signature as a director, the report of said Bank to the Comptroller of the Currency which was also duly published, which report, in the item of "loans and discounts" contained, as he well knew, the paper of Maltby & Company, Alzina Maltby, Maltby Cedar Company, and W. I. Brotherton & Company, referred to in his declaration and bill of particulars.

That in 1903 before plaintiff purchased any stock in said Bank, he knew that the items "loans and discounts" in the report to the Comptroller of the Currency contained good and bad paper, and knew that all the obligations said bank held were included in "loans and discounts," as the law required, good or bad as the case might be.

That he knew about the business career of Alvin Maltby for fifteen

years prior to the time that he purchased any stock in said Bank, knew that he had failed more than once, and that all of that time he had done business at the Second National Bank, which held a large amount of his paper.

THOMAS A. E. WEADOCK,

Attorney for Defendant Frank P. Chesbrough.

Dated: Detroit, March 15th, 1909.

Filed in Clerk's office, March 16th, 1909.

Bill of Exceptions.

(Filed February 9, 1914.)

Be it remembered that on the trial of this cause in this court at the December term, A. D. 1912, of said court, the Hon. Arthur J. Tuttle, District Judge, presiding, *when* the following proceedings were had, to-wit: Trial commenced on December 3rd, 1912, and was continued on December 4th, 5th, 6th, 7th, 10th, 11th, 12th, 13th, 14th, 17th, 18th, and 19th, 1912.

The jury was empaneled on December 3rd, 1912.

Attorneys for Plaintiff: Edward S. Clark of Gillett & Clark, and John C. Weadock.

Attorneys for Defendants: Thomas A. E. Weadock, Watts S. Humphrey.

It was agreed that objections and exceptions for one defendant would be for the benefit of both.

After opening statements by counsel for the respective parties:

The Court: In speaking of the counts ruled out, was the first count ruled out?

T. A. E. Weadock: The first count was ruled out by the judge.

The Court: What other counts?

John C. Weadock: We now rely on the First, second, fourth, fifth and tenth.

T. A. E. Weadock: Just a moment on that point, your
27 honor. The demurrer was disposed of in the Court of Appeals. Judge Angell decided that that count was out of the case.

Mr. Clark: The ninth count was the only one he excluded.

T. A. E. Weadock: Upon the former trial, plaintiff withdrew from the jury counts three, six, seven, and eight, and the court one and ten, and submitted counts two, four, five, and nine. The Court of Appeals sustains count ten.

John C. Weadock: The Court of Appeals, also, sustains count one, for the reason that the statement was assented to by both of the defendants.

The Court: What was done in the former trial, cannot be binding on this trial.

T. A. E. Weadock: If the Court of Appeals did not sustain count 1, I don't think it can be sustained now.

The Court: There is nothing in that which says it is not a good count.

T. A. E. Weadock: They treated it as out of the case, the trial judge withdrew counts one and ten.

The Court: The reason they withdrew count ten was the reason they discussed the dividends.

T. A. E. Weadock: I object to any testimony under count one, for the reason that that is out of the case.

The Court: The court will consider it in the case.

T. A. E. Weadock: I object to any evidence being received under this declaration.

The Court: Overruled. You may have your exception.

FRANK T. WOODWORTH, sworn in his own behalf, testified as follows:

Direct examination.

By Mr. John C. Weadock:

I am fifty-two years old, and have lived in Bay City for thirty-seven years, and I know both the defendants in this case. On

March 14th, 1903, I purchased some stock of the Old Second National Bank of Bay City. The matter was first brought to my attention by W. O. Clift, of Bay City, an insurance, real estate and brokerage man. I met Mr. Clift one day on the street, and he asked whether I wanted to buy some stock of this bank. He showed me a statement from a newspaper, published by the bank. I asked him to call at my office, and when he came, he figured out the statement that the bank was paying semi-annual dividends of 5%, and that that was a little better than a 6% investment.

Objected to and asked that it be stricken out.

It was thereupon conceded that the three books produced by plaintiff's counsel were the files of the Bay City Tribune containing the published reports set forth in the declaration, and that these reports were published in the Bay City Tribune, as they there appeared.

Overruled; exception for the defendant.

Q. Is this a duplicate of the statement published in the Bay City "Tribune" on Saturday, Feb. 14th, containing a report of the condition of the Old Second National Bank at the close of business, Feb. 6th, 1903, and shown you by Mr. Clift?

A. Yes.

Mr. J. C. Weadock: I offer the statement in evidence.

Mr. Humphrey: I want to offer an objection to receiving the report in evidence, for several reasons. 1st. The declaration in this case in counts 1, 2, and 3, and probably some of the other counts depend upon this report.

Court: Count 3, I understand, is out.

Mr. Humphrey: 1, 2, 3, 4, 5 and 10.

This objection to the evidence under counts 1, 2, 4 and 5 is for

the reason that the declaration in those counts alleges that the defendants signed those reports that were published when in truth and in fact the evidence shows that they were never signed by the defendants in the case, and that the charge made in the declaration is different from the proofs, as introduced in the case, and there is no evidence that can be introduced in the case that the defendants signed those reports: 2nd. For the reason that it is claimed here that these reports published by these people, or by the bank, signed by these people, the defendants, was a false and untrue representation and no evidence upon the subject can be given, for the reason that the violation of this count is a violation of the statute. The statute that is claimed to be violated is the statute requiring the reports to be made to the comptroller, and those the statute
29 requires to be signed, and there are no such requirements in regard to the reports that were published, and we object for the reason that there is a variance between the proofs, and the allegations in this declaration, and that no proofs can be given under it for the reasons that I have stated, and that the statute does not require the proofs to be signed, and in fact they were never signed by any one of the defendants.

T. A. E. Weadock: This report that you offer in evidence was not signed by defendant Chesbrough. It purports to be signed by defendant McGraw, E. B. Foss, and James E. Davidson. What is alleged against these gentlemen in the declaration is that they attested this report, and they violated the statute by attesting the reports, which is not correct. There is nothing in the declaration alleging that they did anything, except attesting the reports.

Mr. Humphrey: What I desire to say further to the court in the decision, as your Honor will see it, if your Honor reads the decision of the Court of Appeals is this, that this report in order to comply with the requirements of the statute, that they had to report all of these loans and discounts that were upon the books. I say this so that your Honor may understand the force of the objection. The comptroller of the Currency calls for a report from the books of the bank on a day named, and the bank cannot, by any possibility, do anything but report correctly what the books show. If they do not they are liable to a heavy penalty, and they must show what the books show. There is no claim here that they made any report which was false, so far as not reporting the condition of the bank as appears by the books of the bank on a certain day. The Court of Appeals says that if there was any act that caused damage to any one, it was the act of their reporting correctly what the books show, but it was the act of the directors of the bank in the failure to charge off certain things. Now, then, the court says further, that in order to make the bank, or any of its officers liable for the failure to charge off, they must show that the directors, with full knowledge, did not act when they should have acted and that the failure of the board to act was the cause of the loss. They must prove that the individual director was at the meeting where the subject was discussed, and the failure to act, and that under that evidence there is no possibility of making these defendants liable. Now, what is the case that must

30 be shown? Under the decision of the Court of Appeals, it is that that board failed to act. The Court of Appeals says, not any one, two or three could act. It requires the majority of the board, and it requires a board action to charge off these accounts. There is no allegation in the declaration stating that the board failed to act, and that the board should have charged these things off, and that the board failed to do that; no allegation that any one of these directors, especially these defendants, in the board meeting failed to bring a motion before the board to act upon them. The court puts it right, then if anything was done wrong, it was the failure of the board to act. There is no allegation in the declaration that the board did not act, or that either of the defendants prevented action.

The Court: It is both true that the report must be correct, according to the books, and it follows from that that they must keep the books correctly, and that decision says that when a director finds out that a loan is bad, and cannot be collected within a reasonable time, it must be charged off to profit and loss, and they must make a report of it.

Mr. Humphrey: It is the board that must act when a director can not act. The situation here is that when one is the primary prerequisite to liability, must not that be proven?

The Court: Each director when he finds that out must do the right thing to charge that off.

Mr. Humphrey: There is no allegation in the declaration that such thing failed to be done. There is no allegation that the board did not do this thing. The whole claim is that this report constitutes the difficulty, and this Count One, Count Two, and Count Four, and Count Five, each one of these Counts specifically tells of these false reports, and not the fact that the board failed to do a thing that they should have done. That being true, the reports are not false, because the reports are exactly the kind of reports that the bank is called upon to make. That is the reason that the Court of Appeals says, that no recovery could be had in this case, except upon Count Ten.

The Court: Well, I cannot understand that.

Mr. Humphrey: They allege that this man fails to comply with the statute by assenting to a false report. There is no negative action declared against them in this declaration from beginning to end.

31 It is the affirmative action against these two directors, and the reports that they have singled out, as the ones they have signed. The Court of Appeals talks all the way through of a negative action; that the board did not do a certain thing, and the members of the board did not do a certain thing.

The Court: Motion overruled.

T. A. E. Weadock: Note an exception. First report in evidence, February 14th. Received, and marked Exhibit One. (For this exhibit, see Count One on page —.)

(Report read by Mr. John C. Weadock.)

Mr. Humphrey: If the Court please, I move that that part of the report, reading the names of these men as though their names were

signed in that report be stricken out, because there is no proof that these men ever signed these reports. I am only making this objection at this time, because I want it so that the court will understand it. There is no proof that these men signed these reports. These men never signed that report. That report should not be read to the jury as though they had signed it, and I ask that it be stricken out, that part be stricken out that the report was signed by the three men there.

The Court: That is a duplicate of the original that went to the Comptroller?

Mr. Humphrey: The report that goes to the Comptroller is not that report, and it is not like that report. From the report that goes to the Comptroller somebody else, some official of the bank, makes up a statement that he publishes, then he is in the habit of attaching the names of the same men who signed their names on the report that goes to the Comptroller. These men did not sign that report. There is no evidence that they did not sign such a report; neither was there any evidence that they did sign it.

The Court: Objection overruled.

Mr. T. A. E. Weadock: Note an exception.

Mr. John Weadock: I offer in evidence the same report, published in the same paper, under the following dates:

The Court: What is the date of this paper?

32 Mr. John Weadock: February 14th. The report is of the condition of the bank at the close of business on Feb. 6th.

Mr. T. A. E. Weadock: I object to any publication except one, because one publication is all that is recognized. My objection is that it is irrelevant.

Mr. John Weadock: I offer in evidence the same report published in the same paper on Feb. 12th, 1903.

Mr. T. A. E. Weadock: I object to that going in evidence subject to the objections previously made.

The Court: That may be admitted (marked Exhibit 2).

Mr. John Weadock: I offer the same report published in the same paper on the 15th, and ask that the same be marked Exhibit 3. (For this exhibit, see first count, page —.)

Mr. T. A. E. Weadock: What would be gained by introducing the same thing three or four times?

The Court: It may be received.

Mr. T. A. E. Weadock: Exception.

Mr. John Weadock: I offer in evidence the report published on the 13th.

Mr. T. A. E. Weadock: Same objection.

The Court: It may be received.

Mr. T. A. E. Weadock: Note an exception.

Mr. John Weadock: I offer Exhibit 4. Old number 60. (For this exhibit, see first count, page —.)

Mr. T. A. E. Weadock: Same objection.

The Court: It may be received.

Mr. T. A. E. Weadock: Exception. (Exhibits 2, 3 and 4 were the same as Exhibit 1.)

Witness resumes: On March 14th I purchased twenty shares of stock, and paid \$3,200.00 for them. That is all I purchased in March, 1903. This check for \$4,170.00, includes payment
33 for this stock, and also for some telephone stock, purchased at the same time, from the same gentlemen. This check is in two pieces, and dated March 16th. Check offered and received in evidence. (Marked Exhibit 5.)

Q. When you purchased that stock at that time, upon what did you rely?

Objected to as incompetent; overruled; exception. (P. 10.)

A. I relied upon the published statement which Mr. Clift showed me.

Mr. T. A. E. Weadock: We object to this check marked "Exhibit 5" being received in evidence.

Overruled; exception.

At that time, I had no knowledge of the condition of the Old Second National Bank, other than that I have spoke of.

Mr. Humphrey: We ask that the testimony as to what he relied on, be stricken out.

Overruled; exception.

Witness resumes: I read over carefully the reports as to the condition of the bank, as published in the Bay City "Tribune;" each report at least once or twice.

Mr. John C. Weadock: I offer in evidence the report on the Old Second National Bank, April 9th, 1903, as published in the Bay City "Tribune," April 14th.

Objected to; overruled; exception.

Exhibit received, and marked No. 6. (For copy of Exhibit 6, see second count, page —.)

Mr. John C. Weadock: I offer the same report, published in the same paper, on April 15th and 16th, and ask that they be marked Exhibit- Nos. 7 and 8 respectively.

Same objection; overruled; exception.

(Exhibits 7 and 8 were the same as Exhibit 6.)

Q. At the time you made this first purchase, about which you have testified, state what was done with reference to the certificate, whether you got a new one?

Objected to as incompetent; overruled; exception.

A. I got my stock from the Second National Bank, and a new certificate was made out. I don't know where he got it.

Mr. T. A. E. Weadock: I ask that the answer be stricken out, for the reason that he bought it from some other stockholder.

34 The Court: The answer may stand.
Exception.

The next purchase was made on May 26th, 1903, when I bought twenty-five shares, and paid \$3,950.00 for them. This check, dated May 26th, and made out for \$3,950.00 is the check I gave in payment.

Offered in evidence, and marked Exhibit Nine.

Objected to; overruled; exception.

This stock was delivered in the same way as the other. In making this purchase, I did not seek it, but it was brought to me by Mr. Clift.

Objected to; overruled; exception.

In making this purchase, I relied upon the published statement of the bank, both of Feb. 6th, and later, one of April 9th.

All objected to, and exception taken.

I had no other information regarding the condition of this bank, except that furnished in this statement.

Mr. John C. Weadock: I offer in evidence the report of the condition of the Old Second National Bank, at the close of business of June 9th, 1903, as published in the Bay City "Tribune" on June 13th, 1903.

Objected to, as Mr. Chesbrough had nothing to do with the signing of the report. It does not even appear that he was in the city.

The Court: I think perhaps in view of your objection I should tell the jury that this case is of such a nature that under the law and evidence therein, both defendants might be held liable, or neither be held liable, or either one be held liable without the other, so that the jury will at all times have in mind as to whether the evidence concerns one or both of these defendants and, if it concerns only one they need not consider it against the other. As the particular exhibit comes in, it is not always possible for the court to tell at that time whether it concerns one or both of the defendants. That is for the jury and they must keep watch of these things. Two very material things in this case are whether the claim of the bank against Maltby had any material value at that time and whether these defendants knew it. Of course upon the question as to whether they knew it, there may be evidence against one or both, or against

35 one and not the other, and if it is admissible against either one, the court will admit it in evidence. There might be a case where the directors are responsible for the report and one or both of the defendants may not have anything to do with it.

Objection overruled; exception.

Report received in evidence, and marked Exhibit 10. (Copy of this exhibit is seen in the third count, on page —.)

Mr. John C. Weadock: I offer in evidence the same report, published in the same paper on the 14th and 15th of June, and ask that they be marked Exhibits Nos. 11 and 12.

Objected to; overruled; exception.

(Exhibits 11 and 12 were the same as Exhibit 10.)

Mr. John C. Weadock: I next offer this in evidence.

Mr. T. A. E. Weadock: I ask that that report be not considered against Mr. Chesbrough since it was not signed by him.

Mr. John C. Weadock: I contend that, for the present, any statement made in this case and that report was made from the books of the Old Second National Bank, kept under the directions of both the defendants, with the knowledge that the paper of the Maltby Company to the extent of \$220,000.00 was not then charged off, and it was, also, published with the knowledge of both the defendants, that such report would be published from the books of the bank, and would so report the condition of the bank, when it should have been charged off a year ago.

Mr. T. A. E. Weadock: I object to that as an improper statement before the jury, and the further objection that the books he says were kept under the direction of the Board of Directors, of which these defendants were two. So far as the directors were concerned, it was considered perfectly good at that time by all the directors.

Mr. Humphrey: Mr. John C. Weadock says, that it is false, and these two defendants knew it.

The Court: I will say to the jury now, that you will pay no attention to what counsel on either side of the case says. You will take the facts relating to the case from the witnesses, and the two important questions that will be for your consideration, will be, what

36 was the value of the Maltby Lumber Company claim, and the other important element will be, when you decide what it was worth, did the two defendants or either of them, know that.

Of course, knowledge on the part of one would not be binding on the other, unless he, too, has the same knowledge. So that all the way through, you must try to find out what knowledge each of the individuals had. I think the statement which I have made before, and can make again, will be sufficient for you to say each time when the proofs come in, which one of the parties had knowledge, which question you must consider from the testimony introduced. If this claim was worthless, and the two defendants did not know it, they would not be liable, but if they did know it was worthless they would be liable, but if only one knew that it was worthless, and the other did not have this knowledge, the former would be liable, and the latter not.

Mr. John C. Weadock: I next offer the statement of the condition of the bank at the close of business on September 9th, 1903, as published in the Bay City "Tribune," Sept. 16th, 1903.

Mr. T. A. E. Weadock: Same objection.

The Court: Exception.

Accepted in evidence, and marked Exhibit No. 13.

The attestation clause of this exhibit contained the names of Frank P. Chesbrough, J. W. McGraw and James Davidson. In other respects this exhibit was the same as the report set forth in the fourth count of the declaration in which Fremont B. Chesbrough's name appeared as an attesting director.

Witness resumes: The next purchase of Old Second National Bank stock I made was on Sept. 16th, 1903, when I bought thirty shares

and paid for them by personal check \$4,650.00. This check was dated Sept. 16th, and made payable to the order of George W. Ames.

Received in evidence, and marked Exhibit 14, subject to the same objections and exceptions. At the time of making this purchase, I relied upon the statement published in the "Tribune" that morning, and had no other knowledge of the then condition of the Old Second National Bank.

Objected to as incompetent, irrelevant and immaterial; overruled; exception. (Page 20.)

Q. Did you have any other information when you made this purchase, or any previous purchase, other than that contained in these statements, as to the condition of this bank?

37 Objected to, for the reason that at this time, he was a stockholder, and had the right and means of examining the bank's books, and acquiring all the knowledge he cared to, and so is chargeable with such knowledge.

Overruled; exception.

Q. What was the date of the next purchase of stock in the Old Second National Bank which you made of your own account?

A. December 16th, 1903.

Mr. John C. Weadock: Next I offer in evidence the report of the condition of the same Bank at the close of business on Nov. 17th, 1903, published in the Bay City "Tribune," Nov. 22nd, 1903.

Marked Exhibit 15. (Copy of this exhibit is in the fifth count, on page —.)

Received, subject to the same objection and exception.

Same report published on November 24th, in the same paper, received subject to the same objection, and marked Exhibit No. 16.

Witness resumes: I next purchased seventy shares for \$10,150.00 on December 16th, 1903, giving my personal check for \$10,150.00, No. 20,207, drawn on the Commercial National Bank. I purchased this stock relying on the statement made previously in November.

Check received in evidence, and marked Exhibit No. 17.

The next Second National stock I purchased, I think was on the same day, December 16th, when I bought ten shares for \$1,470.00, relying on this statement, and without any other knowledge or information in regard to the bank's condition. In payment for this stock, I gave my personal note for fifteen days, dated December 17th, 1903, and payable to the order of W. O. Clift, amount \$1,470.00.

Received in evidence, and marked Exhibit No. 18.

Mr. T. A. E. Weadock: We take an exception.

Q. Mr. Woodworth, did you rely solely upon this statement? or did you rely upon anything else than the statement, any other information you might have with respect to any of these purchases?

Objected to as having been fully covered, and we object to his repeating it; overruled; exception. (Page 23.)

A. Before I bought the first stock, I went up to Mr. Andrews, and he took off a statement on a slip of paper, and it practically
 38 compared with the statement of Feb. 6th. It showed a little bit better about a month later. When I made the purchase on December 16th, I went to Mr. Andrews at his office, and he took off a statement of December 16th, and it showed up practically the same. There was no other information that influenced me in making the purchase of stock. The fact that they paid five per cent. dividend influenced me to buy the stock. At and prior to the time I made this last purchase, I had no knowledge whatever with relation to the business of the Maltby Lumber Company, or any information at all with regard to the line of paper the Maltby Lumber Company had in the Old Second National Bank. I knew Mr. Alvin Maltby. I had considerable business with him, along from '90 to '95 bought logs together, bought some with him. We were friendly; saw each other quite often, and this relationship existed during the years '90 to '95, during the Mosher failure, and my relations with him lasted for only five or six months after the failure.

Q. With the closing out of A. Mosher & Company, and the A. Maltby affairs, they were brought to a head in 1895, that closed your business with him?

A. That ended my relations with him entirely, both as to business, and as to personal relations.

Cross-examination.

By Mr. T. A. E. Weadock:

I am fifty-two years old, and came to Bay City when I was sixteen years old. I went to High School, but did not graduate from it. I attended High School for two years, and when I left I was eighteen years old. I then went to work as messenger boy in the Second National Bank, situated in the Westover Opera House. This is a different bank from the Old Second National. The cashier of the bank at that time was Mr. Orrin Bump. He was president when these transactions occurred. Charles M. Bump was teller in the bank then. Mr. D. C. Smalley was my uncle, and a director of the bank at that time, and remained so until 1898, when he died. Mr. James S. Smalley, who was a relative of Darwin C. Smalley, was my father-in-law and lived in my family. I have known Davidson, the ship builder, for some years after he came here. He is a prominent and successful business man, and so is his son. I have lived next door to his son on Center Street, in this city, for a little less than
 39 eight years. Mr. Edgar B. Foss lived just across the street, and I know him very well. He has, also, been for many years, a successful business man. I moved into the house as a neighbor to them after I bought the stock. I knew Aaron J. Cooke during his life time; he was director in 1902 and 1903. I knew J. W. McGraw, Frank Chesbrough, and his father, Alonzo Chesbrough, who was a director when I worked there. After his death, Frank P. Chesbrough became a director. I was messenger in the bank about three years, during that time I frequently went to

Carter & Maltby, at the foot of Center street, where they had a feed store. I knew Alvin Maltby, of the wholesale grocery firm; afterwards he sold out, and went into the lumber business. When I ceased to be a messenger, I became check and deposit bookkeeper for a little less than two years. The difference between the Second National and the Old Second National Bank is that the latter is a reorganization of the former. I had all this knowledge as to this bank, prior to 1902. I knew of the Mosher failure in 1895, and knew that the Second National Bank lost a considerable amount of money in that failure, and had to cut their stock from \$400,000.00 to \$200,000.00. I knew that this same Alvin Maltby was connected with Mosher, and that there was a large liability on the part of Mosher and Maltby in the Second National Bank, although I didn't know just how large it was. I was then in the lumber business. After having been in business with Slater & Woodworth for a year or two after I left the employ of the bank. I still kept my account in the Second National bank. I next went with Smalley & Woodworth in connection with William Smalley and D. C. Smalley who carried on a foundry, and did business with the Second National Bank. The firm of Smalley & Woodworth continued in business about twelve or thirteen years. They lost about \$117,000.00 in the Mosher-Maltby failure. This was the same Alvin Maltby. The Second National Bank did not lose anything by the failure of Slater & Woodworth, who were given an extension of time, and who paid off in twenty-eight months. During all this time I kept my account at the bank. The account of Alvin Maltby, during the entire time he was doing business, was kept at the Old Second National Bank. Mr. Orrin Bump came from Flint. I knew him well from the time I went to work in the bank, until he left in 1902. From what little I knew about the bank, I thought he was a very competent banker. As bookkeeper, I had knowledge of all money that went out of the bank, and of course, knew that Maltby & Brotherton had an account there.

40 In 1902, I had no reason to consider Orrin Bump anything else than a thoroughly honest and capable man, and a good banker. That was the general judgment in Bay City, especially among the business men. His health failed in 1902; he then left for California, and died there some years later. When I bought this first stock in 1903, I did not ask any of these gentlemen, who were directors at that time, as to the bank's condition. As I testified, I went to see Mr. Andrews twice in relation to the condition of the bank. After the failure of Maltby & Mosher, as a matter of interest and curiosity, I began to read these statements the bank published in the newspapers, as to their condition. On account of the Maltby failure, the Old Second National reduced its stock, one-half. With the exception of Mr. Bump, the main officers of the bank were the same, who were in the bank when I bought my stock, and managed its affairs at the time of the Mosher failure. I have known M. M. Andrews, the cashier, since 1878. Charles M. Bump was there as teller during all that time. I have known Edgar B. Foss since 1883 or '84. James Davidson succeeded Orrin Bump as president of the bank and he was succeeded by his son James E. Davidson, both of

whom were directors at that time. It was perhaps a week or ten days previous to March 14th when I first began to inquire about the bank's stock in regard to purchasing it. I never tried to buy the stock of Mr. Lamont. I never talked with Charles E. Eddy about the bank's stock before March, 1903, but I have so talked with him since I purchased my last stock. In 1905 I was elected a director. On the 11th of January, I signed a report of the condition of the bank. That was the first bank report that I had ever signed as a director. Before that time I had owned stock in two other corporations, for a very short time. I presume I would have the right to make inquiry and examination of the books and affairs of the company in which I held stock with regard to its assets and liabilities. I did not know that for a long time before 1903. The only corporation I ever belonged to, besides the bank, was the Robert Gage Coal Company. I knew on March 14th, 1903, how the bank's statements, which were published in the papers, were made up. I know, as a bookkeeper, in the bank that the bank's affairs were all balanced each day, so that at the close of each day, the books would show the exact condition of the bank. I knew that this statement, shown me by Mr. Clift, was taken from a daily statement of the affairs of the bank. I think that Martin M. Andrews is an honest, capable, and honorable man, and have always believed him so. This statement was signed by him as cashier, and sworn to by him. This made no difference, in
41 my judgment, of the statement. Andrews simply swore to this statement as a copy from the books. I believed the statement to be a true copy of the statement of the day, which was called for by the Comptroller of the Currency. I do know what loans and discounts means. They mean loans, discounts, and drafts, and this I knew on the 14th of March, 1903. On the day of the statement, the amount of the loans and discounts were something over one million dollars.

Q. \$1,063,640.00. You knew on that day that that included all the paper that that bank held, did you not?

A. I presume so. I knew that that included the paper that was supposed to be good.

Q. You swore several times before, you have been a witness several times in the courts, you have been a witness in these cases twice. You were a witness in the Saginaw Circuit Court in the Smalley case?

A. Yes. I was a witness in that proceeding with reference to the Cedar Company. With reference to the mandamus proceeding against the bank and against the Cedar Company, I don't remember being a witness in that.

Q. Was not your attention called to that testimony in that case on the last trial?

A. You have it there.

Q. Don't you remember now?

A. I don't remember.

Q. Look at that testimony to see if it refreshes your recollection as to whether or not, you were a witness in that proceeding?

A. Well, what have I got to read over here.

Q. Just take your own time.

A. I undoubtedly was.

Q. So that this is the fourth time that you are giving testimony with reference to this matter? Before you signed the report of January 11th, 1905, you had made an examination, as a member of the Committee, of the affairs of the Old Second National Bank.

A. No, we had not of the affairs.

Q. On the trial in the Saginaw Circuit Court, were not these questions asked of you, and you made these answers?

"Q. You were appointed on the investigating committee, and how long did it take you?

A. We didn't investigate.

Q. I ask you how long you served on this investigating committee?

A. About an hour and a half.

Q. That was previous to the time you were elected a director?

A. Yes.

Q. How long was that committee continued?

A. It didn't continue at all.

Q. What did you do in that hour and a half?

A. We went over the foreign bills discounted, and Mr. Andrews showed us the amount of the Maltby Cedar Company indebtedness, note of \$276,000, with some inventories and so on, of the lands and bills of sale."

Q. Were you asked those questions, and did you make those answer?

A. Yes. After that I signed this report of January 11th, 1905.

42 Mr. T. A. E. Weadock: This is a copy of the report. I have the original here. Have you any objection?

Mr. John C. Weadock: If it is a copy of it, go ahead.

Received in evidence, and marked Exhibit 19.

Witness resumes:

In 1903 Mr. Clift told me that he had for sale Old Second National stock. I think I asked him whose stock it was, but he did not tell me. I didn't ask Mr. Andrews, McGraw, Chesbrough, or either of the Davidsons who was offering the stock for sale, and never spoke a word to McGraw or Chesbrough regarding the purchase of this stock before I bought it, or regarding the financial condition of the bank. At that time I had some money to invest, and he came to me, with an offer to sell the stock. I did not go to him. I didn't ask him why he wanted to sell the stock. I think I asked him whose stock it was, but he didn't tell me. I read the report when Mr. Clift produced it. I had taken the paper for a long time, but I don't remember whether or not I read the statement in the paper before Mr. Clift called my attention to it. He had been in the banking business for many years, in the First National Bank, and was cashier of the Commercial Bank for some years. I did not know that the loans and discounts meant all the paper that the bank had, and I thought that the value of the loans and discounts depended upon the live paper, supposed and carried as good. I had an idea that there was some bad paper, not included in the loans and

discounts that were already charged off. I thought that the loans and discounts, included all the paper held by the bank, which the bank's directors considered good. I testified in the Saginaw Circuit Court that I knew that that amount, which is the amount of loans and discounts, regardless of their value, represented the loans and discounts, regardless of their value, and that I knew that that statement in any report must list the amount of loans and discounts held by the bank on that day, regardless of their value, but if I did so testify, it was a mistake, and I didn't answer correctly, or else did not think far enough ahead.

Q. You didn't think of the effect it had on this litigation?

A. That is not what I am talking about.

Q. Then what do you mean?

A. Just what I said. At the time I was in that bank, it carried large amounts of discounts, and it might have some bad paper in it. I knew that the loans and discounts contained all the paper of the bank, which, the directors supposed to be good at the time, but there might be some bad paper in it. I read through the report of February 6th, which Mr. Clift showed me. The amount of the
43 deposits of the bank on that day, as shown in that report, were a little over \$806,000.00. The loans and discounts amounted to something over a million. The amount of the bonds was \$200,000.00. I am testifying both from what I heard since, and my recollection of what I read on that day. I went to see Mr. Andrews regarding the statement some time previous to March 14th, and it was after that I bought the first stock. I told Andrews that I was figuring on buying stock, and wanted to know what the standing of the bank was, and he made a pencil copy from the book, and it practically compared with the statement published. This was before the 14th of March, and after I had talked with Mr. Clift. I didn't try to find out whose stock it was. Mr. Andrews' statement differed from Mr. Clift's only in the additions to the interest and discount items, what they had made in the month which had passed. It was a month later. Mr. Andrews' statement showed a little better than that of Mr. Clift's, and gave more details. I did not buy the stock on the statement of Mr. Andrews, but relied strongly on the other. I asked Andrews for his statement, to find the losses out. I did not rely entirely on the other statement until after I had seen Andrews. The fact that I had been employed in the bank,—done business with it,—knew the directors, and knew that the bank was properly managed when I was in the bank did not make any difference with me in buying the stock, although, perhaps, I might not have had equal confidence if everybody had been entire strangers. I had confidence in the men who signed the statement. It looked good and paid dividends. There was nothing in the statement about the dividends, but Mr. Clift spoke about them. I did not ask Mr. Andrews about them. I knew Mr. C. L. Collins, the bank's attorney, for several years, and I presume I had every opportunity of asking him. I don't remember all who signed the first report, upon which I invested my money. It made no difference; I knew that it was signed by reputable directors; I knew those directors met every

week. I knew that Mr. Andrews' statement was made from books of the bank on that day, and I knew that the statement signed, was signed by three directors called in to sign, for the reason that the law requires that it be signed by three of the directors. As a director of the bank, I examined the loans and discounts myself. I became a director in January, 1905. I never examined them as a stockholder, nor did I so examine the deposits, nor the stock securities, and claims nor the amount due from National Banks and bankers, nor from state and private banks and bankers, nor from approved reserve agents, nor from exchanges for clearing houses, nor the fractional paper currency, nor the lawful money reserve in the bank, nor the legal tender note, nor the redemption fund with the

44 U. S. Treasurer. In 1903 I never went into the bank to examine its condition, nor did I ask Andrews any questions regarding it, after March 14th. When I signed the report on the 11th of January 1905, as a director of the bank, I did not count over the loans and discounts, or verify in any way, any statement made in that report that I signed, but I took that statement to be a correct transcript from the books of the bank on that day, and that the employees of the bank were honest and capable, and would make a correct transcript. For that reason, and the reason that Andrews asked me to sign it, I signed the report. Mr. Andrews swore that this report was correct to the best of his knowledge and belief. I didn't think that the report of 1903 was made up in any different way from the one I signed in 1905. I have known Mr. Maltby a great many years, and have bought timber with him. I bought about \$20,000.00 dollars' worth of timber in Canada, but disposed of it in about 1896, owing to the Mosher failure. Mr. Maltby did not discount my paper at that time, but several times we gave paper to each other, when I didn't have the necessary funds to meet a note on maturity. I understood Mr. Maltby went through bankruptcy. He lumbered for many years out of other people's money, getting it all from this bank, and I know when he was in business with me that he was doing business with the Second National Bank, but the Maltby Lumber Company did business with other banks besides the Second National, but Mr. Maltby always had an account at the Old Second National. I read the report of April 1903 of the Old Second National Bank, when it was published in the Bay City "Tribune." This time I did not see Andrews about it. I can not remember whose names were signed as directors to this daily statement of the 9th of April, 1903. It didn't make any difference whether it was McGraw's or Chesbrough's name which was signed to the report. It did not make any difference to me whether it was McGraw's name that was signed to the report, neither did it make any difference whether Chesbrough's name was on the report, or whether it was signed by James Davidson.

Q. Or any other director?

A. No, three directors signed it, and it didn't make any difference to me what director signed it. Three must sign the report, and it made no difference who signed it. Any one that would come in would be asked to sign it. Then the next time some one else may be

asked to sign it. This is the way they were signed when I was in the bank. So it did not make any difference to me whether this director or that director signed the report. I did not pay a bit of attention to it. I was governed by what the report reported.

45 At the time of the second report of the condition of the Old Second National Bank, I had not found out whose stock I bought, and I didn't care whose stock I bought, because I had it. It might have made a difference whether one of the directors was selling me his stock. It did not occur to me to inquire. I wanted to buy the stock, and I had it, and that satisfied me. I did not know in April, 1903, that Mr. Cooke, one of the directors, was selling his stock. I did not know who it was that was selling me their stock, and I didn't care. I did not go to Mr. Andrews, or any other officer of the bank, in reference to the statement of the 9th of April, 1903. After the report of April 9th, I bought some stock. I didn't know whose stock I bought at that time, and I did not inquire. I did not notice that the loans and discounts had gone lower in April from what they were in February, that in February they were \$1,063,-463.00 in round numbers, and that they had gone down. This made no difference with me. I probably noticed the difference between the amount of deposits, but this made no difference with me either. Mr. Clift spoke to me about dividends the time he showed me the first statements. I knew he was acting as a broker, trying to sell me the stock, and it was then he spoke to me about the dividends, but I did not ask him. My father-in-law, James S. Smalley, had held stock in the bank for more than eight years previous, and I knew from him that the stock was paying dividends during the last four years, so that I knew about the dividend without Mr. Clift telling me. It was in 1904 or 1905 when they paid the last dividend. Sometimes I read the statements of the Old Second National, prior to March 1903. Mr. Smalley did not talk much about his business affairs to his family, although he talked a little about the result on the bank of the Mosher failure. This was in about 1896.

"When I saw the next statement of June 9th, 1903, nobody showed it to me. It made no difference to me who attested that report and I do not now know who it was. I don't remember whether I noticed the increases in the loans and discounts as compared with the previous report or whether the deposits had increased or decreased.

"Q. Did you pay any attention to the affairs of the bank after you first began to buy stock?

A. No, I paid no attention to their affairs.

"Q. So that the reports that were made between the first report of February 1903 and the last report in November 1903, made no difference to you at all.

A. No, it could not.

"Q. You got all of your information from the first report?

A. From the first and succeeding reports.

Q. You have just told us that the other reports made no difference to you, which is correct?

A. I said who signed them, made no difference.

46 Q. They didn't differ much?

A. It didn't differ much. What shortage it might show

in deposits or loans and discounts would compare with the shortage in the price when I bought my stock. That is I paid less for stock in December than I did earlier.

I doubt whether Mr. Andrews would have shown me the account if I had asked him. I doubt it because after I was a director I didn't get the books. I don't remember of ever asking Andrews for any information with reference to the bank or its affairs when I was a stockholder between March and December, 1903, that he did not answer. I did not inquire of Andrews, or of any one else, who were the makers of the papers known as the unpaid loans and discounts in February or March 1903. I don't think I ever made such inquiry before January 1st, 1904. I did not notice that neither McGraw or Chesbrough had sworn to the statements of the bank. I should say that attesting a statement is practically the same thing as swearing to it.

Q. If you relied upon the first statement shown you by Mr. Clift, why did you care about the later statements?

A. Just to see. I had a right to see if they changed.

Q. Did you rely on the statement that Mr. Clift showed you, or the statement that Mr. Andrews made?

A. The statement that Clift showed me.

Q. If the statement shown you by Mr. Clift, had not been signed by any director, would it have made any difference to you?

A. It certainly would, for it would not have been a legal statement, as the law requires such statements to be signed by three directors.

Q. You have stated again and again, during this cross examination, that it made no difference to you what director attested the statement, or whether any director attested it?

A. I didn't say that.

Q. Did it make any difference in this report, whether any director attested it, or who attested it, that is, did it make any difference to you?

A. Yes. If it had not been so attested I would not have considered it true, and it would not be a legal statement. When I attested the report of January 11th, 1905, I know I had a liability of \$9,200.00 in the bank, but I didn't know that the \$9,200.00 was in the report, nor did I know that E. B. Foss had a liability stated in that report at \$35,000.00. I don't know the amount of deposits that were mentioned in that report, nor do I know the amount of loans and discounts in it, on which officers and directors were liable as payers or endorsers. I did not know the amount of the U. S. bonds to secure circulation. I don't know whether or not they had \$31,630.00

in gold in their hands at that time. I don't know what the surplus fund was, nor what the undivided profit, or the amount due to the National Bank amounted to. I don't know what the Old Second National owed to state and private banks and bankers. I was director of the Old Second National May 29th, 1905. I presume I signed on May 29th, another of the bank's reports.

Q. Is this a copy of it?

A. Yes, it is. At that time James E. Davidson was president of the

bank, and this report was signed by Andrews as cashier, and also, attested to by him. George B. Jennison and James E. Davidson and myself, signed as directors. I thought it was correct when I signed it; that is, a correct statement from the books of the bank for that day. I didn't know that the items of loans and discounts on these two reports I signed contained a large amount of the Maltby paper.

In the Saginaw Circuit Court, I testified that when I was elected a director, I knew this bank had this Maltby paper which amounted to \$270,000.00. After I knew this, I said over my signature that the loans and discounts of that bank were \$899,821.14. This was in the statement of January 11th. I did not receive this information from Mr. Walter Ballou, nor did I receive any information from him that I remember.

Q. In the Saginaw Circuit Court, were you asked these questions, and did you make these answers? (Page 288 of the Record.)

"Q. Loans and discounts include the money the bank had, you knew that?

A. No, the bank had cash.

Q. I say all the paper that the bank has, all the obligations that the bank owns, are loans and discounts?

A. Yes, I think so.

Q. That includes them all, good, bad, and indifferent?

A. I don't know; they carried some suspended bills.

Q. Is it in the loans and discount accounts?

A. No, it is in the suspended account, isn't it.

Q. You knew all that, didn't you? You can say you know or didn't know.

A. Well, I don't know about that.

Q. You mean to say that loans and discounts don't include all the paper that the bank has?

A. It includes all the paper.

Q. Good or bad?

A. Until it is charged off to profit and loss.

Q. Then, don't it stand as loans and discounts?

A. Not when it is charged off.

Q. But it is still loans and discounts, but it isn't figured in the loans and discounts after it is charged off? That is what you mean?

A. Yes.

Q. So that you knew that the item of loans and discounts included all the paper that the bank had in what is called "live paper," whatever its value might be?

A. Whatever is carried in the loan and discount account.

Q. Whatever it was, good or bad, as the case might be?

A. Yes."

— Were you asked those questions and did you make those answers at Saginaw?

A. I think so.

48 Q. Did not Mr. Ballou leave after you commenced your litigation in this matter with these defendants?

A. He was still there when I was a director. I don't know when he left. He might have been there the year after. I first began this

litigation in 1905. I don't remember if he left the bank in 1905. He was there when I was director, I know that.

Mr. Clark: Have you before you the record from which you read?

Mr. T. A. E. Weadock: Page 288.

Mr. Clark: Where did you commence on the page?

Mr. T. A. E. Weadock: Bottom of page 288.

Mr. Clark: Will you read the paragraph before that?

T. A. E. Weadock (reading): "Were you asked these questions and did you give these answers? What does loans and discounts mean?"

A. That means paper that the bank discounted.

Q. What do you mean by that?

Q. The drafts and promissory notes, and all obligations that the bank has?

A. Yes, practically.

Q. You knew that included good debts and bad debts?

A. It is supposed to include good debts.

Q. Sometimes bad debts?

A. If the paper turns out bad, yes.

Q. Did you make those answers to those questions at Saginaw?

A. I think they were."

Then follows what I read.

Q. Now, I want to read a little more. Were you asked these questions, and did you make these answers?

"Q. You say you think you did? You mean you know you did?"

A. I think I answered that way.

Q. You know you answered that?

A. If it is there, so I did.

Q. Why do you say, you think you did?

A. Because I have not looked it over, and can not remember four years.

Q. Then you knew that in this item of loans and discounts, in this report, it is stated at the sum of \$1,063,463.40, there was some paper that might be bad?

A. I didn't know it.

Q. And you knew there was some paper that might be indifferent?

A. I don't know what you mean by "indifferent."

Q. It might be good or bad?

A. Paper sometimes turns out to be bad after it is taken, and which is supposed to be good.

Q. You knew that then, didn't you? You knew some paper that you had handled, had turned out bad before that time?

A. I know that most banks sometimes have some bad debts.

Q. You didn't make a single inquiry with reference to this matter of loans and discounts before you bought your stock, and you
49 knew at that time that it included all the paper that the bank had, good, bad or indifferent?

A. I supposed the paper was good, that they carried in loans and discounts.

Q. Why did you say when you were asked that question, that you knew it included paper of all kinds, good or bad?

A. I meant to say that it might include some paper. It might be bad after it was taken, but supposed to be good when taken."

A. Yes.

Q. Were you asked these questions, and did you make these answers at the trial at Saginaw? Page 56 of the Smalley record, near the bottom of the page.

"Q. Then you knew that the directors signed these reports as being correct, because the officers and bookkeepers of the bank submitted them as correct?

A. That is all I know in regard to it. They signed the statements which were made out."

Q. Did you make that answer?

A. I presume so, and if I did, it was true.

Q. Were you asked these questions, and did you make these answers?

"Q. That's why they signed them, because they were supposed to be correct, coming from the officers of the bank?

A. I know the directors signed these statements, and they were supposed to be correct.

Q. The directors signed these papers, because they supposed them to be correct. Is that your answer?

A. Yes.

Q. You knew they never examined the paper?

A. They always examined the paper,—examined it when it goes through the bank.

Q. They never examined the paper just before they examined the reports to see whether the proper amount of loans and discounts were stated in the report?

A. They never went over the paper and footed it up to prove it was correct. The discounts were taken in the first instance by the cashier a man came in with a piece of paper to be discounted, and the cashier usually decided whether it would be discounted or not, and he put his little mark on it, and it went to the teller, and was either credited up to the man's account, or he got the cash on it. These directors now have meetings once a week; when I was there they used to have a discount committee which met every morning. They passed upon the work of the day previous."

Q. Were you asked those questions, and did you make those answers?

A. I presume I did. I don't believe I did know as much about banking then as I do now. At the time I bought stock in this bank in March, 1903, Frank P. Chesbrough did not live three
50 houses from me on Center Avenue. He did not live on Center Avenue then.

Q. Were you asked these questions, and did you make these answers: in the Smalley case at Saginaw? (Page 60 Smalley Record.)

"Q. What does loans and discounts mean?

A. That means the paper that the bank discounted.

Q. What do you mean by that? The drafts and promissory notes and all of the obligations that the bank has?

A. Yes, practically.

Q. You know that means good debts and bad debts?

A. It is supposed to included good debts.

Q. Sometimes bad debts?

A. If the paper turns out bad, yes."

Were you asked those questions, and did you make these answers?

A. I cannot remember.

Q. Again, on page 61.

"Q. So that you knew that the items of loans and discounts included all the paper that the bank had, in what is called "live paper," whatever its value might be?

A. Whatever is carried in the loan and discount account.

Q. Whatever it was, good or bad, as the case might be?

A. Yes.

Q. I mean, collectible or uncollectible? How much allowance did you make in your meetings for poor paper in the item of Loans and Discounts of a \$1,000,000 or more?

A. Didn't make any allowance at all.

Q. Did you think it was all good?

A. Well,—

Q. Answer the question.

A. It might be all good.

Q. Did you think it was all good?

A. I did.

Q. Did you know of any bad paper in the bank all the time you were there?

A. Well,—while I worked there. No, I don't remember any.

Q. After you were out of the bank, and were in business for yourself, did you know of any?

A. Yes, I know the bank had some bad paper.

Q. They had bad paper from time to time all the while, didn't they, and every bank does?

A. A small amount, yes.

Q. They made a loss by your very firm, didn't they?

A. A small one.

Q. They made another loss by D. C. Smalley?

A. No, sir, they didn't make any loss by him.

Q. You mean to say with loans and discounts of \$1,081,446.05 you thought that was all good?

A. Practically good.

Q. What do you mean by that?

A. I mean there might be a small shrinkage, but if they were carrying a large discount,—

Q. How much shrinkage?

A. That was my answer. If they carried a large discount—

Q. You went down to the bank and made some inquiries about this matter, didn't you? You went down and talked with Mr. Andrews?

A. Yes.

51 Q. Why didn't you ask him whether they had any bad paper?

A. It didn't occur to me to ask him. He said that the books were——"

Were you asked those questions, and did you make those answers?

A. I presume I did.

Q. Page 88: Were you asked these questions, and did you make these answers:

"Q. You signed this after it was made up. That is the report of Jan. 11th, 1905?

A. Yes, I signed it the day after I was elected, without any investigation.

Q. The day after you were elected?

A. Within five days anyway. It was called for the 11th."

You were asked those questions, and did you make those answers?

A. Yes.

Mr. T. A. E. Weadock: I think that is all. I want to reserve the right to ask further questions on cross examination if anything further comes up. I think that is all I want to say.

Redirect examination.

By Mr. John C. Weadock:

Q. You said something about having made some examination as a stockholder of the affairs of the Old Second National Bank. I don't know what you said in that regard. I want to inquire in that connection whether you ever made any examination of any kind prior to the time you purchased your first stock? Or prior to the time you purchased your last stock; the last purchase being made in December, 1903.

A. Sometime in 1904.

Q. What I want to get at is whether before you made your last purchase in 1903, you made any examination with reference to the affairs of the bank as a stockholder?

A. No, sir.

Q. In answer to one of Mr. T. A. E. Weadock's questions, you said the report was not made up in any different way in 1903 than in 1905. Referring to the report to the Comptroller, that was published in the paper, what do you mean by that?

A. I don't know of any difference in making it up, never saw any made up in 1903. I supposed they were the same as made up in 1905. They were made from the books of the bank every day. In my testimony I stated I did not know which of the gentlemen signed the reports that I examined during the year 1903.

Q. Will you say what you meant by saying it did not make any difference to you?

52 A. It didn't make any difference to me which three of the bank, signed the statement. I knew all the directors personally, and all were reputable business men. I had been a director of the bank since the 10th of January, 1905, and had been at the weekly meetings, and had seen the records of the paper in, and had a

statement before us every day. I inaugurated that myself. Every discharge, we had the paper before us, showing liability on each accommodation, and later in May, the semi-annual examination of the bank was made, and I was one of the committee. I helped count the cash and the resources, went over every item of discount, and called it off to another man, and saw every maker and endorser of the paper. I was there and handled them all. I went over the certificates of deposit, and the items in the books, and signed the report to that effect, saying I had gone into all that was in the book. This was in May 1905.

Q. Had anything been done with reference to the Maltby Lumber Company line, when you became a director, up to the time you made that report in May, 1905?

A. In January at the directors' meeting, a resolution was passed to charge off \$135,000.00 of the Maltby Cedar Company's paper, which was taken some time in February.

Q. Why was not more of the paper charged off at that time, in January?

Objected to, since what the bank did about the paper, does not touch the question at all, and is incompetent; overruled; exception for the defendants.

A. The reason they did not charge off any more was, because they did not have surplus enough to do that. By reducing the capital stock \$100,000.00, and charging off \$135,000 of the Maltby paper, and \$72,000.00 of the Brotherton paper; \$300,000.00 was wiped out.

Q. Was this Maltby paper that was in the bank, at the time you made this statement, and signed it in May 1905, within a short time afterwards, charged off to profit and loss?

Objected to as incompetent; overruled; exception for the defendants.

A. It was charged off at different times, as the bank earned enough to do it with any small amount, until, I think, it was entirely wiped out, the other \$100,000.00.

Q. Now, I will return to the items of that \$300,000.00, which you say was wiped out?

Objected to as not a proper way to examine plaintiff; overruled; exception for the defendants.

53 Q. What items had you in mind then?

A. The capital stock had been reduced \$100,000.00—\$135,000.00 of Maltby Cedar Company paper was charged off, and also, the Brotherton matter in the neighborhood of \$73,000.00, making it practically \$300,000.00.

Q. Now, should you add to the figures you have given, the amount that the capital stock was decreased, was not \$135,000.00 charged against this decrease, are you not doubling these two items?

Objected to; overruled; exception for the defendants.

A. The capital stock was cut in two; that took away \$100,000.00

from the stock, which was applied to the charging off of the \$135,000.00, and the \$72,000.00.

Q. Then you have included \$100,000.00 too much?

A. I mean that \$100,000.00 to reduce the stock.

MARTIN M. ANDREWS, a witness for the plaintiff, being duly sworn, testified as follows:

"It was thereupon conceded that the Old Second National Bank was organized under the National Banking Act. It was first organized in 1873, under the name of the Second National Bank, and was re-organized in 1894 under the name of Old Second National Bank. It was also conceded that the defendants were both elected directors of the bank continuously from 1894 to and including the year 1904. That at the meeting in January, 1905, Mr. McGraw was not elected, but Mr. Chesbrough was elected, and resigned in March, 1905."

54 Direct examination.

By Mr. Clark:

I live in Bay City, and am at the present time the Cashier of the Old Second National Bank. I am seventy-three years old, and have been cashier in the bank since 1894, and previous to that—since 1878, I was Assistant Cashier; before that time I was bookkeeper; that is, two years previous to that, nearly two years. It was the Second National Bank up to 1878, when it absorbed the State Bank, and continued up to the year 1894, up to the expiration of the first charter, and since then it was the Second National Bank. I was actively engaged in the bank in the year 1903.

Q. Do you know what the practice of the bank was in 1903 with reference to the manner in which the reports were made to the Comptroller and published in the papers?

A. Yes.

Mr. T. A. E. Weadock: Objected to as incompetent and immaterial.

The Court: Overruled.

Q. Will you state what was done in that year with reference to the making of the reports to the Comptroller—first, what came to your attention or to the attention of the bank in each case which indicated to you that reports were to be required on a given date?

A. We always received a circular request from the Comptroller of the currency for such reports.

Mr. Clark: We offer in evidence, Exhibit 21, containing all the requests of the comptroller; offer them in one exhibit, and consider them read.

55 Witness resumes: I have three of the bank's copies of the reports that I made in 1903,—April 9th, Sept. 9th, and November 17th. We have the reports of February and June, also, on file.

The five reports published in the newspapers in 1903, being the
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reports of Feb. 6th, April 9th, June 9th, Sept. 9th, and November 17th, were published as a part of the requirements of the comptroller of the Currency, and in connection with the reports sent to Washington at the same dates.

Q. What was done in regard to the report of February 6th, 1903, with reference to getting the signatures of the directors, Mr. Andrews?

A. It is identical with every case of that kind. The practice of the bank in getting signatures on these reports was that after the reports were completed in every detail, the Directors were asked to come and sign them. They were shown the reports and asked to sign them. I first made out the report; I did the clerical work of making the report. I got the facts stated in the report from the books of the bank, or from the daily statements. The daily statement book was the result of each day's business transactions, carried out in final. The books of the bank that were carried into the daily statement book, or final, was the deposit books, general ledger, and the teller's blotter, and this was done every day. In making up the report from the daily statement, I copied the daily statement, then I showed the copy to the directors, and asked them to sign their names. I had told certain of them beforehand that I was about to publish a report and asked them to be on hand to sign. The copy for the printer is the face of the daily statement, made up quickly, and sent to the publishers by me before details of the other report, on a blank provided for that purpose by the comptroller. Attached to this copy were the names of the directors that signed the report. In case they did not actually sign it, I wrote their names on it; then the report with an affidavit that is published, also, and affirming this is the report of the condition sent to the comptroller, is sent to the publisher. This copy was ready before the other was ready to sign, and I attached to it the names of the directors. In choosing these names for the printer's copy, I put on the names of those directors who were most likely to be present to sign the other report. I always tried beforehand to ascertain if they were in the city. These directors

56 actually signed two copies of the same report. Our method of making up, signing, sending to the Comptroller and publishing these reports was the same during the entire year 1903.

Q. Coming back to the years before 1903, how long had this been the established practice of the bank to make up the reports by this method?

Objected to as incompetent and leading. Overruled. No knowledge of this on the part of either defendant being shown. Exception for the defendants.

A. Always so far as I know, that has been the custom since the establishment of the Second National Bank. That was the custom in practically every instance when I made the reports and when Mr. Rump made them. I began to make them when I became Cashier in 1894.

Q. What do you say as to whether all the directors of the bank understood and were acquainted with this practice?

Objected to as incompetent and leading; overruled; exception for the defendants.

A. I suppose they were informed about it in a general way. It didn't make any difference who signed the report to the comptroller, for I had a ruling from the comptroller of the currency on that point. I don't recall any instance of either McGraw or Chesbrough objecting to this method of making out and publishing reports. All the directors, including McGraw and Chesbrough, were from time to time called upon to sign the reports.

Q. To the best of your knowledge and belief will you state what objection, if any, any of them ever made to that method?

Objected to as immaterial and incompetent; overruled; exception for the defendants.

A. I can not recall now, they may have done so.

Q. Taking up the five reports of 1903, that were published, state whether or not, they all included, among the loans and discounts, the entire line of the Maltby Lumber Company paper?

Objected to as incompetent and not the best evidence; overruled; exception for the defendants.

A. In 1903, I believe they were all carried as assets and all at their face value.

Q. Have you here the profit and loss account, showing when the first amount was charged off, from the Maltby Lumber Company paper?

Objected to as being after November, 1903; overruled; exception for defendants.

A. Yes, here. (Witness produces book.)

Mr. T. A. E. Weadock: Get the account, Mr. Andrews, before answering the question.

Q. Will you find the first item? What part of the Maltby Lumber Company paper is charged off, Mr. Andrews?

Mr. T. A. E. Weadock: Now it is proposed to offer some paper charged off in 1905 near two years later, and it is not competent, in my judgment, any way in this case.

Mr. Humphrey: Mr. McGraw was not present at the time they were charged off. He was not there, and I understand Mr. Chesbrough was not.

The Court: This has another bearing, but shows what the paper was worth. I am talking about the value.

Mr. T. A. E. Weadock: I am talking about the value. Things might have happened in these two years; it might have been destroyed by fire, but what the conditions were in 1905, can not tend in any way as a comparison with the year 1903. They must prove

nothing done on the part of the directors prior to November, 1903, the date of the last report.

The Court: Here you take a great line of assets in 1903, and one of the material matters for the jury is what that was worth.

Mr. T. A. E. Weadock: What they believe it to be worth.

The Court: It becomes material to ascertain what it was worth, and then, also, what knowledge they had of it.

Mr. T. A. E. Weadock: But you cannot show that by showing what was done in 1905 under entirely different conditions.

The Court: In order to find out what it was worth, you will have to go and look at it.

Mr. T. A. E. Weadock: You cannot prove that by showing what happened in 1905.

The Court: Only as bearing on what it was worth then.

Mr. T. A. E. Weadock: You cannot have it for that purpose.
58 Mr. Humphrey: Does it not bring up the matter again that we had up so often? You take this situation; if your Honor has examined this record, your Honor will remember the evidence on one thing, that all of this paper was deeded to the bank in 1903, and all of the personal property was transferred to the bank early in 1904. The whole thing was put in the hands of the bank; the bank put some one in to handle that property and to dispose of it. Now, the question is here, what they are attempting to show is what the bank got out of it. Your Honor can see that that hasn't anything to do with estimating the value of it at the time it was turned into the bank. For instance, there was one hundred things intervening. Your Honor well knows that no business is any better than its management. The management of a business in a business of this kind; the question as to what that was worth, at that time, was never determined by what somebody gets out of it.

The Court: If the claim was paid in full, could they recover? If the claim was paid in full, the plaintiff can not recover.

Mr. Humphrey: I do not think they can show whether it was paid in full or not—the fact that it was paid in full. Bear in mind, the distinction I am trying to raise is the value of the assets of the Maltby Company at the time they turned it over. It would be no evidence of what the assets were worth when they turned them over, if they had realized the entire amount of money, these gentlemen, or anyone else, would not be liable, but it might be they realized the money out of the assets at the time they turned them over, but to the bank they would not be worth a quarter of the amount, of the assets.

Mr. T. A. E. Weadock: In support of what I stated before, I offer paragraph two, opinion on the motion to modify,—The proof in this case is absolutely limited to November 17th, 1903. What was done after that by the bank or any one else can not affect these defendants in any way. The value of the assets and knowledge of their value is a material thing before November 17th, 1903. And that cannot be shown by what the bank did two years after. The Court of Appeals speaking of the ninth count, and the review of the entire charge says,—in paragraph fourteen of the opinion,—(Reading). Now, why the Court of Appeals referred to the date: Because they say, after

the date of the report, defendants had knowledge, the defendants' liability may be estimated as of this date; that is, December 16th, 1903. That limits the proof to that date. You can not show by what the bank did in 1905, what the property was worth in 1903, and what these defendants thought it was worth in 1903. What it was worth in 1903, must be shown by the value of that kind of property during all that time, not of a later time.

The Court: How will you show what it was worth in 1903? The bank of course could not get what the property was worth and it would not be fair to show what the assets would be worth if sold in one lump and collected quickly.

Mr. Weadock: It is a question of what the defendants thought at that date, and if the plaintiff can not show that they are mistaken, he is bound by it. They can prove what the property was absolutely worth.

The Court: No bank can get what it is worth.

Mr. T. A. E. Weadock: There comes the difference between a going concern and the property closed out at a loss as a rule. These directors must know it. They all must know it. These directors had to take what the man had to give, and then the question was, what they fairly considered it worth.

The Court: The question is as to the proof from which the value is to be found. The value is the value or the knowledge of the defendants in 1903, but what happened in 1905 may throw light on the knowledge the defendants had in 1903.

Mr. Humphrey: Your Honor says that the bank could not possibly get out of the assets what they were worth. That is true. A banker cannot take a lumber business and close it out and get what it is worth. Now the very thing has happened that your Honor can see would happen when the banks take this kind of property that they had not any ability to handle. It came up to the place where the directors had to take it and they got what the man had to turn in and they took that away from him. This property, when taken away from Maltby, was appraised at the value of \$118,000.00, and Mr. Lewis swears positively that this amount is correct. The bank then attempted to run the lumber business for two or three years instead of closing it out at once, and in consequence, it is claimed that we have perpetrated a fraud upon Mr. Woodworth in representing assets to be good which, it is claimed, we knew were bad.

Now, what must they prove to prove the fraud? That this property in 1903 was not worth the amount of the Maltby indebtedness, that it was not of sufficient value to pay his indebtedness at that time. They must prove that. Yet, there is no evidence offered what it was then worth. The burden is upon them to show what it was worth. They can not show what it was worth in 1905, and then cast the burden of proof on others. The remarkable thing is that it brought as much as it did.

The Court: The evidence will be received. Take an exception.

Mr. Humphrey: If the jury is to determine the value of this property in 1903 from what the property brought in 1905, it will be only conjecture. The Supreme Court of the United States and the Circuit

Court of Appeals have decided that no case must be left to conjecture. The price the property brought in 1905 might be the result of a change in market conditions. It might have resulted from incompetent management. It might have resulted in any number of ways, but the jury does not know what brought it about, without evidence in any way showing, or tending to show it, that is, what the value was. They can only conjecture.

The Court: Is not the real question the value of the claim to the bank, not the value of the property?

Mr. Humphrey: If the value of the property was equal to the bank's claim, there would be nothing wrong.

The Court: When was this property turned over to the bank?

Mr. Humphrey: It was turned over in December, 1902, and the personal property a short time afterwards.

The Court: And this property scattered all over was turned over to the directors and there is no way in the world that the bank could realize the full amount out of it. If the directors knew that they could not get much out of it but the directors got that turned over to them and they could not get more than \$1,000, out of it, then should they not charge off all in excess of \$1,000.00? That scattered business might be worth \$10,000 to the individual. If they had a situation that they could not realize out of it, then their claim would not be worth so much.

Mr. Humphrey: But if the court please, this situation is this, is it not necessary for them to prove what it was worth on that day?

61 The Court: What the claim was worth at that time, not what the property was worth to anybody else, but what it was worth to the bank.

Mr. Humphrey: Can they show what the securities were worth two or three years thereafter as tending to show what the claim was then worth in 1903?

The Court: Possibly it would take that length of time to work it out.

Mr. Humphrey: Supposing the directors did charge off a lot of this property on their books, and in consequence of this someone sold his bank stock for less than it was worth, and that afterwards the bank realized full amount on this property, part of which they charged off: then we would be sued, because we realized this money. We can not be liable both ways. The Supreme Court of the United States has held that these men are not guarantors of the value of the paper in the bank, or as to what will happen two years from that time; they must exercise only good faith. They are not liable for honest mistakes, and therefore, I submit that the evidence is not competent, and I object to all the evidence after November 17th, 1903.

Objection overruled: exception for defendants.

Mr. Clark: We offer in evidence the entry in the profit and loss account of February 20th, 1905 as follows: "Maltby Cedar Company, \$135,000.00."

Witness resumes: The Maltby Lumber Company was the first organization. This was a trade name used by Alzina Maltby. The Maltby Cedar Company was a corporation organized later on the advice of the bank for the purpose of closing up the business and getting it in better shape.

Objected to as incompetent and immaterial, and not the best evidence; overruled; exception for the defendants.

Q. And, now, will you state the entire amount of the Maltby paper that was finally charged off to profit and loss, and show it by the books of the bank.

Mr. T. A. E. Weadock: Objected to as before.

The Court: Overruled.

Exception for the defendants.

Q. (continued). We don't ask for the items, unless Counsel wants them, we want the total amount.

A. I will have to figure them up. This book does not go far enough to give the entire amount, and I have not got here the
62 book that does. This book shows \$155,000.00. I would not state the entire amount, as I do not know. I will produce the other books this afternoon, and give you the entire figure. I have here the record book containing the articles of association and the by-laws of the bank, and will produce it.

Mr. Clark: We offer in evidence articles 4, 5, 11 and 14 of the By-Laws of the bank marked Exhibit No. 22.

Objected to as incompetent; overruled; exception for the defendants.

Exhibit 22 was as follows:

EXHIBIT 22.

By-Laws.

Article IV.

Directors' Meeting.

SEC. 1. A regular meeting of the Board of Directors shall be holden once a week at such times as the Board of Directors may elect.

SEC. 2. At all meetings of the Board of Directors, the minutes of the preceding meeting shall be read before the Board proceeds to any other business, and no debate shall be admitted nor question taken upon said minutes except as to errors, inaccuracies and approval.

Article V.

Committee on the State of the Bank.

SEC. 1. This Committee shall be composed of the Board of Directors in a Committee of the Whole. It shall be its duty at any time

at its option, and at least as often as once in six months, and always during the month preceding the day for considering the declaration of any dividend, to make an examination of all the affairs of the Bank, count the cash and compare the assets and liabilities with the balance in the General Ledger, for the purpose of ascertaining if the books are correctly kept, and the condition of the Bank corresponds therewith and whether or not the Bank is in a sound and solvent condition, and report the result of said examination to the Board at its next meeting.

SEC. 2. It shall also be the duty of the President at any time, to order an examination of the Bank whenever two or more of the Directors shall request it.

SEC. 3. The semi-annual dividend period of this Bank, at the close of which its accounts shall be balanced and dividends, if any, declared, shall be the six months ending May 31st, and the six months ending November 30th, in each year.

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Article XI.

Quorum.

SEC. 1. A majority of the Directors, including the President, shall be a quorum to do business.

Article XIV.

Daily Statement.

SEC. 1. The cashier shall cause a daily statement of the various accounts, showing the resources and liabilities of the Bank, to be made on the morning of each business day, in a book prepared for that purpose, and such daily statement book shall be kept in the Bank, and upon demand of any Director, he shall have the right to examine said book.

Witness resumes: The daily statement described in Article 14 of the By-Laws was made up each day and kept in the bank. During the day it was kept on a desk in the office, and at night, put in the vault.

Objected to unless there is a claim that the directors actually saw it. It cannot be negligence. Overruled. Exception for the defendants.

(Witness produces minute book marked Exhibit 23.)

This book contains the minutes of the Board of Directors' meetings since April 1894.

Mr. Clark: We offer in evidence certain minutes of the meetings of the old Second National Bank. There are parts of the minutes which have no bearing in this case. The whole record may go in if counsel desires, but we have prepared a typewritten copy of such parts of the minutes as have any bearing on the case and will have them marked as the easiest way of identifying the parts of the record

which we offer. We commence with January 3, 1902, and the last meeting is that of December 11, 1903. The typewritten copy is marked Exhibit 23.

Mr. Humphrey: If we can examine these tonight, it may do away with the necessity of taking a whole lot of testimony and perhaps save a day.

Mr. Clark: Yes, that would be a satisfactory way.

Exhibit 23 was as follows:

64 *Portions of Directors' Minutes of 1902 and 1903 Offered in Evidence by Plaintiff.*

Regular meeting, January 3, 1902.

Present: Bump, McGraw and Cooke (Sec'y).

Discounts to date read. No quorum.

Regular meeting, January 10, 1902.

Present: Bump, Eddy, McGraw, Foss and Cooke.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, January 17, 1902.

Present: Directors Bump, McGraw, Foss, Cooke (Sec'y), Jas. E. Davidson. The report of inspectors of election of directors held on Jan. 14th, 1902, was read and showed the election of the following:

Orrin Bump.

James Davidson.

J. W. McGraw.

E. B. Foss.

A. J. Cooke.

Frank P. Chesbrough.

James E. Davidson.

Selwyn Eddy.

Discounts to date read and approved.

Minutes of last meeting were read and approved.

Regular meeting January 24, 1902.

Present: Bump, McGraw, Chesbrough and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, January 31, 1902.

Present: Bump, Davidson, McGraw and Chesbrough and Cooke, (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting Feby. 7, 1902. (Date in book reads 1901.)

Present: Bump, McGraw, Cooke, Capt. Davidson, Jas. E. Davidson.

Minutes of last meeting read and approved.

Discounts to date also read and approved. (Cook, Sec'y.)

65

Regular meeting February 14, 1902.

Present: Bump, Jas. E. Davidson, McGraw, Chesbrough,
Foss and Cooke, (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, February 21, 1902.

Present: Bump, Chesbrough, Jas. E. Davidson, McGraw and Cooke
(Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, February 28, 1902.

Present: Bump, Chesbrough, McGraw and Cooke and Foss, Jas.
E. Davidson, (Cooke Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, March 7, 1902.

Present: Jas. E. Davidson, Bump, Foss, McGraw and Cooke
(Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meetin, March 14, 1902.

Present: Chesbrough, Bump, Cooke (Sec'y) McGraw, and Foss,
Jas. E. Davidson.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, March 21, 1902.

Present: Bump, Capt. Davidson, Jas. E. Davidson, McGraw, Foss
and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, March 28, 1902.

Present: Bump, Foss, McGraw, Cooke, James E. Davidson, (Cooke
Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meetin April 4, 1902.

Present: Bump, McGraw, Foss and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

66

Regular Meeting, April 11, 1902.

Present: Bump, Jas. E. Davidson, Foss, McGraw, and
Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, April 18, 1902.

Present: Orrin Bump, E. B. Foss, J. W. McGraw, J. E. Davidson,
A. J. Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date approved.

Regular meeting, April 25, 1902.

Present: Bump, J. E. Davidson, Foss, McGraw and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, May 2, 1902.

Present: Bump, Jas. E. Davidson, McGraw, Cooke (Sec'y), Ches-
brough.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, May 9, 1902.

Present, Bump, Jas. E. Davidson, McGraw, Chesbrough Cooke
(Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular Meeting, May 16, 1902.

Present: Bump, Jas. Davidson, Jas. E. Davidson, Foss, McGraw,
and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, May 23, 1902.

Present: Bump, McGraw, Chesbrough, Foss, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting May 31, 1902.

Present: Bump, Jas. E. Davidson, Cooke, McGraw.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

67 On motion the report of Com. of the Whole of the Board
of Directors on examination of the assets and liabilities of O.
S. N. B. of B. City was accepted and placed on file.

Moved by McGraw and seconded by Davidson that a dividend of
5 per ct. be declared out of the earnings of the past 6 mos. Carried.

A. J. COOKE, Sec'y.

Regular Meeting, June 6, 1902.

Present: Jas. E. Davidson, McGraw and Cooke (Sec'y).

Discounts to date read. No quorum.

Regular meeting, June 13, 1902.

Present: Bump, Jas. E. Davidson, Chesbrough, McGraw, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular Meeting: June 20, 1902.

Present: Bump, McGraw, Jas. E. Davidson, Foss, Chesbrough and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, June 27, 1902.

Present: Bump, Jas. E. Davidson, McGraw, Foss and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting July 3, 1902.

Present: Bump, Jas. E. Davidson, McGraw, Chesbrough and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, July 11, 1902.

Present: Bump, McGraw, Jas. E. Davidson, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular Meeting, July 18, 1902.

Present: Bump, Jas. E. Davidson, McGraw, Foss and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

68 Regular meeting, July 25, 1902.

Present: Bump, Jas. E. Davidson, McGraw and Cooke, (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, August 1, 1902.

Present: Bump, Jas. E. Davidson, Foss, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular Meeting, August 8, 1902.

Present: Bump, Jas. E. Davidson, Foss and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, August 15, 1902.

Present: Jas. E. Davidson and Cooke (Sec'y).

No quorum.

Discounts to date read.

Regular meeting, August 29, 1902.

Present: Foss, J. E. Davidson, Foss and Bump (Sec'y pro tem.).

Discounts read to date.

Regular meeting September 5, 1902.

Present: Bump, Foss, McGraw, Chesbrough and J. E. Davidson, (Sec'y pro tem.).

Discounts and loans for week ending Sept. 5, 1902, read and on motion approved.

Minutes of last meeting approved.

Regular meeting, September 12, 1902.

Present: Jas. E. Davidson, Bump, Cooke (Sec'y) McGraw, Foss.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting September 19, 1902.

Present: Bump, Jas. E. Davidson, McGraw, Foss, Cooke, (Sec'y).

Wm. Westover, former President, also present.

Minutes of last meeting read and approved.

Discounts also read and approved.

Regular meeting, September 26, 1902.

69 Present: Bump, Jas. Davidson, Chesbrough, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, October 3, 1902.

Present: Bump, McGraw, Chesbrough, Cooke (Sec'y) Capt. Davidson, Jas. E. Davidson.

Minutes of last meeting read and approved.

Discounts to date read and approved.

Regular meeting, October 10, 1902.

Present: Jas. E. Davidson, McGraw and Cooke (Sec'y).

No quorum.

Regular meeting, October 17, 1902.

Present: Jas. E. Davidson, McGraw, Chesbrough, and Cooke, (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, October 24, 1902.

Present: Jas. E. Davidson, McGraw, Foss and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

On motion of Jas. E. Davidson, Mr. Wm. McGraw was instructed to visit parties owing Maltby Lumber Co., and learn the status of such acct. up to the date of his, McGraw's visit.

A. J. COOKE, *Sec'y*.

Regular meeting, October 31, 1902.

Present: Jas. E. Davidson, McGraw, Foss and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

On motion Cashier Andrews was instructed to write to parties owing Maltby Lumber Co., and on whom we have drafts, asking for statements of acct.

Regular meeting, November 7, 1902.

Present: Bump, Jas. Davidson, Foss, McGraw and Cooke, (Sec'y).

Minutes of last meeting read and approved.

Discounts to date read and approved.

On motion of McGraw, Mr. Bump was granted a leave of absence for 6 mos. from date.

70

Regular meeting November 14, 1902.

Present: Bump, Jas. E. Davidson, McGraw, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, November 21, 1902.

Present: Jas. E. Davidson, McGraw, Chesbrough, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting November 28, 1902.

Present: Foss, McGraw and Cooke (Sec'y) and Jas. E. Davidson.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Special Meeting, December 1, 1902.

Present: Foss, McGraw, Jas. E. Davidson and Cooke, (Sec'y).

On motion of Mr. Cooke, a dividend of 5% on capital be declared and payable Dec. 2, 1902.

A. J. COOKE, *Sec'y*.

Regular meeting, December 4, 1902.

Present: Foss, Jas. E. Davidson, McGraw, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, December 12, 1902.

Present: Jas. Davidson, McGraw, Cooke, and Jas. E. Davidson, (Cooke, Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, December 19, 1902.

Present: Jas. E. Davidson, Foss, McGraw, Cooke, (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, December 26, 1902.

Present: Foss, McGraw, Cooke, (Sec'y). No quorum.

Discounts to date read.

71 Regular meeting, January 2, 1903.

Present: McGraw, Foss and Cooke, Sec'y. No quorum.

Discounts to date read.

Regular meeting, January 9, 1903.

Present: Jas. E. Davidson, McGraw and Cooke, (Sec'y).

Discounts read to date. No quorum.

Regular meeting, January 16, 1903.

Present: Jas. E. Davidson, McGraw and Cooke (Sec'y).

Discounts to date read. No quorum.

Special meeting, January 19, 1903.

Special meeting of the Board of Directors this 11:30 A. M.

Present: Jas. E. Davidson, Foss McGraw and Cooke.

Minutes of former meeting read and approved.

Report of Inspectors of Election held Jan'y 13, was read and on motion rec'd and ordered on record. Said inspector's report showed that the following were elected directors:

J. W. McGraw, Jas. E. Davidson, A. J. Cooke, F. P. Chesbrough, Jas. Davidson, E. B. Foss, Orrin Bump.

Regular meeting, January 23, 1903.

Present: Foss, Cooke (Sec'y) McGraw.

Discounts read to date. No quorum.

Regular meeting, January 30, 1903.

Present: Jas. E. Davidson, Foss, McGraw, Cooke (Sec'y).

Minutes of meetings from Dec. 26-Jan. 23 read and approved.

Discounts to date also read and approved.

Regular meeting, February 6, 1903.

Present: Jas. E. Davidson, McGraw, Foss and Cooke, (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, February 13, 1903.

Present: Jas. E. Davidson, McGraw and Cooke (Sec'y).

Discounts to date read. No quorum.

72 Regular meeting, February 20, 1903.

Present: Foss, Jas. E. Davidson, McGraw, and Cooke

(Sec'y) Jas. Davidson.

Minutes of Feb'y 6 and 13 read and approved.

Discounts to date also read and approved.

Regular meeting, February 27, 1903.

Present: Jas. E. Davidson, Cooke (Sec'y). No quorum.
Discounts to date read.

Regular meeting, March 6, 1903.

Present: Jas. Davidson, Jas. E. Davidson, Foss, McGraw, Cooke (Sec'y).

Minutes of last meeting read and approved.
Discounts to date also read and approved.

Regular meeting, March 13, 1903.

Present: Jas. Davidson, Jas. E. Davidson, McGraw, Foss, Cooke (Sec'y).

Minutes of last meeting read and approved.
Discounts to date also read and approved.

Regular meeting, March 20, 1903.

Present: Jas. Davidson, Jas. E. Davidson, McGraw and Cooke (Sec'y).

Minutes of last meeting read and approved.
Discounts to date also read and approved.

Regular meeting March 27, 1903.

Present: Jas. Davidson, Jas. E. Davidson, McGraw, Chesbrough, Cooke (Sec'y).

Minutes of last meeting read and approved.
Discounts to date also read and approved.

Regular meeting, April 3, 1903.

Present: Jas. Davidson, McGraw, Chesbrough, Cooke (Sec'y), James E. Davidson.

Minutes of last meeting read and approved.
Discounts to date also read and approved.

Regular meeting, April 10, 1903.

Present: Jas. E. Davidson, Foss, Chesbrough and Cooke (Sec'y).

Minutes of last meeting read and approved.
Discounts to date also read and approved.

73

Regular meeting, April 17, 1903.

Present: Chesbrough, Cooke (Sec'y), Jas. E. Davidson and Foss.

Minutes of last meeting read and approved.
Discounts to date also read and approved.

Regular meeting, April 24, 1903.

Present: Foss, Chesbrough, McGraw and Cooke (Sec'y).

Minutes of last meeting read and approved.
Discounts to date also read and approved.

Regular meeting, May 1, 1903.

Present: Jas. E. Davidson, Foss, McGraw and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, May 8, 1903.

Present: Jas. Davidson, McGraw, Foss, Chesbrough, Cooke, Sec'y,
Jas. E. Davidson.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, May 15, 1903.

Present: McGraw, Chesbrough, Cooke (Sec'y), Foss.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, May 22, 1903.

Present: McGraw, Jas. E. Davidson, Jas. Davidson, Foss, Ches-
brough and Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, May 29, 1903.

Present: Foss, McGraw, Cooke (Sec'y), Jas. Davidson.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Com. on Examination of Bank report assets and liabilities as cor-
responding with statement of May 26, 1903.

On motion a dividend of 5 per ct. on the capital stock and from
the earnings of the past 6 mos. was declared payable June 1, 1903.

Regular meeting, June 5, 1903.

Present: Foss, Jas. E. Davidson, Chesbrough, McGraw, Cooke
(Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

74 Regular meeting, June 12, 1903.

Present: Capt. Jas. Davidson, McGraw, Cooke (Sec'y),
Jas. E. Davidson, Foss.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

On motion of Mr. Jas. E. Davidson, Attorney C. L. Collins was
instructed to notify Mr. Maltby at once to give us a bill of sale of his
property at once.

Regular meeting, June 19, 1903.

Present: Jas. E. Davidson, McGraw, Chesbrough, Cooke (Sec'y).

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, June 26, 1903.

Regular meeting of Board of Directors.

Present: Jas. E. Davidson, Foss, Cooke, McGraw.

Minutes of last meeting read and approved.

Discounts to date also read and approved.

Regular meeting, July 3, 1903.

Present: Jas. Davidson, Foss and Cooke (Sec'y).

Discounts to date read. No quorum.

Regular meeting, July 10, 1903.

Present: Jas. Davidson, A. J. Cooke (Sec'y).

Discounts read to date. No quorum.

Regular meeting, July 17, 1903.

Present: A. J. Cooke (Sec'y), James Davidson, Jas. E. Davidson.

Discounts read to date. No quorum.

Regular meeting, July 24, 1903.

Present: Jas. E. Davidson, Foss, Cooke (Sec'y).

Discounts to date read. No quorum.

Regular meeting, July 31, 1903.

Present: Jas. E. Davidson, Cooke (Sec'y).

Discounts to date read. No quorum.

Regular meeting, August 8, 1903.

Present: Foss, Cooke (Sec'y), Jas. E. Davidson.

Discounts to date read. No quorum.

75 Regular meeting, August 14, 1903.

Present: James Davidson and Jas. E. Davidson.

Discounts read to date. No quorum. M. M. Andrews, Cashier, acting secretary.

Regular meeting, August 21, 1903.

Present: James Davidson, E. B. Foss and Jas. E. Davidson.

Discounts read to date. No quorum. M. M. Andrews, Cashier, acting secretary.

Regular meeting, August 28, 1903.

Present: E. B. Foss.

Discounts read to date. No quorum. M. M. Andrews, Cashier, acting secretary.

Regular meeting, September 4, 1903.

Present: Directors James Davidson, J. W. McGraw, Frank P. Chesbrough and James E. Davidson.

The minutes of board meetings of July 3rd, 10th, 17th, 24th and 31st and of August 8th, 14th, 21st and 28th, at which no quorum were present, were, on motion, approved.

Discounts to date were read and approved.

* * * * *

The resignation of Orrin Bump as Director and President dated June 31st, 1903, was on motion accepted, his pay as President to cease after August 31, 1903.

The resignation of Mr. A. J. Cooke as director was, on motion, accepted.

The Board then proceeded to the election of officers and directors to fill vacancies, with the following result:

M. M. Andrews was elected director in place of Orrin Bump, resigned, and A. M. Chesbrough was elected director in place of A. J. Cooke, resigned. James Davidson was elected President and Frank P. Chesbrough was elected Vice President. Director J. W. McGraw was chosen Secretary of the Board.

Regular meeting, September 11, 1903.

Present: Davidson (Jas. E.), Chesbrough, Foss, Andrews and McGraw (Sec'y).

Regular meeting, September 11, 1903. 11:00 A. M.

Present: Jas. Davidson, M. M. Andrews, James E. Davidson.

Discounts for week read.

No quorum.

76 Regular meeting, September 25, 1903.

Present: Jas. E. Davidson, Chesbrough, Foss, Andrews and McGraw (Sec'y).

Discounts read to date.

Regular meeting, October 2, 1903.

Present: James E. Davidson, Foss, Andrews and McGraw (Sec'y).

Discounts read to date.

Special meeting, October 7, 1903.

Special meeting this 12 M. of the Board of Directors called by the President.

Present: James Davidson, F. P. Chesbrough, J. W. McGraw, Jas. E. Davidson and M. M. Andrews.

On motion of director Chesbrough authority was given to the President or Cashier to execute deeds for the bank.

J. W. McGRAW, *Sec'y*.

Adjourned.

Regular meeting, October 9, 1903.

Present: Chesbrough, Foss, Jas. E. Davidson and M. M. Andrews (James E. Davidson, Sec'y pro tem.).

Discounts to date read and approved.

Regular meeting, October 16, 1903.

Present: A. M. Chesbrough, Jas. Davidson, Frank P. Chesbrough, Jas. E. Davidson and M. M. Andrews (J. W. McGraw, Sec'y).

Discounts to date read and approved.

Regular meeting, October 23, 1903.

Present: Jas. Davidson, E. B. Foss, Jas. E. Davidson, J. W. McGraw (Sec'y) and M. M. Andrews.

Discounts read and approved to date.

Minutes of meetings of Oct. 7, 9, 16, approved.

Regular meeting, October 30, 1903.

Present: Jas. E. Davidson, Foss, Andrews, Frank Chesbrough, A. Chesbrough, McGraw (Sec'y).

Discounts read to date.

Regular meeting, November 6, 1903.

Present: James E. Davidson, Frank Chesbrough, M. M. Andrews, J. W. McGraw (Sec'y).

Discounts read to date.

77 Regular meeting, November 13, 1903.

Present: James E. Davidson, E. B. Foss, Frank Chesbrough, M. M. Andrews, J. W. McGraw (Sec'y).

Discounts read to date.

Regular meeting, November 20, 1903.

Present: James Davidson, Frank Chesbrough, James E. Davidson, M. M. Andrews, J. W. McGraw (Sec'y).

Discounts read to date.

Regular meeting, November 27, 1903.

Regular meeting of Board of Directors this 7 P. M.

Present: James E. Davidson, F. P. Chesbrough, E. B. Foss, M. M. Andrews, J. W. McGraw.

Motion made by James E. Davidson seconded by Foss, that five per cent dividend be declared on capital stock to be paid Dec. 1, 1903.

J. W. McGRAW, Sec'y.

Witness resumes: In these minutes, the words "discounts to date read and approved," referred to the reading by the clerk of the bills as they appeared on the register, giving a full description of them. The discount registers were taken into the directors' room for that purpose. This description included the date of the bill, the maker or endorser, the date of maturity, and the amount; also, whether it was a renewal or not. These directors were paid \$3.00 for every meeting they attended. I have known Mr. Alvin Maltby for about twenty years; he was involved in the Mosher failure.

Q. Did the bank suffer a loss through his paper?

Objected to as immaterial; overruled; exception for the defendants.

A. Yes, there was a loss on his claim. I don't remember now what year it was. Mr. Maltby and his wife began doing business as the Maltby Lumber Company about 1896 or 1897. The prop-

erty was in the name of Alzina Maltby, his wife. Alvin Maltby managed the business. He was the same man who had previously done business as A. Maltby. When Alzina Maltby began doing business with the Old Second National Bank, I do not know as I could tell you whether she had any known capital. I am not sure whether she had any commercial rating.

Q. I ask you to refresh your recollection from the testimony given on the other trial.

88 Objected to as not the best evidence. Overruled; exception for defendants.

A. It was not financially strong, but safe for the business that he asked for.

Q. What about his capital and commercial rating?

A. I don't know as they had any commercial rating. I don't recall what their capital was at that time.

Mr. Clark: Will the fact in regard to the reduction of the capital stock, be conceded?

Mr. T. A. E. Weadock: No, sir.

Mr. Clark: We offer in evidence the minutes of the meeting of January 20, 1897, with reference to the reduction of the capital stock from \$400,000.00 to \$300,000.00.

Mr. T. A. E. Weadock: Objected to as incompetent and immaterial.

Mr. Clark: The only object is to show that the original capital had been reduced. Will you concede that the capital was \$200,000.00 in 1902?

Mr. T. A. E. Weadock: We do not concede it. It is in evidence. We have no evidence that will be offered to contradict that. It has been offered in evidence time and time again.

Mr. Clark: We will take that as a concession.

(Witness resumes): I have here a letter dated October 21, 1902, written by the comptroller of the currency to Orrin Bump. We received this from the Comptroller. I was acting cashier when this was received and opened it. (Marked Exhibit 24.)

Mr. Clark: We offer Exhibit 24 in evidence. The offer is confined to the introductory paragraph and the last paragraph as printed on page 150 of the Record on the former trial. The other paragraph referred to something else.

Objected to as incompetent; overruled; exception for defendants. (P. 128.)

Exhibit 24 was as follows:

PLAINTIFF'S EXHIBIT 24.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF CURRENCY,
WASHINGTON, October 21, 1902.

Mr. Orrin Bump, President Old Second National Bank, Bay City,
Michigan.

SIR: The report of an examination of your bank, made on the third instant, has been received and has had careful consideration.

About forty per cent of the loans and discounts of the bank consists of drafts, on railroad, telephone and telegraph companies, etc., with shipping bills, etc., attached, discounted for the Maltby Lumber Company. These drafts are not forwarded for acceptance or collection. In order to come within the exception of Section 5200 U. S. R. S., relative to "the discount of bills of exchange drawn in good faith against actually existing values," these drafts must have been drawn against commodities in process of shipment from seller to buyer and be accepted by the parties against whom they are drawn. Otherwise they represent direct loans to the Maltby Lumber Co., subject to the limit of ten per cent of capital prescribed by section 5200, U. S. R. S. This matter should receive prompt attention.

An early reply to this letter is requested.

Respectfully,

WM. B. RIDGELY,
Comptroller.

(Witness resumes:)

When this letter was received, Mr. Bump was on his way to Washington. I have here the letter which I wrote to the Comptroller in answer to that. It is dated October 24. I wrote it and sent it to him.

(Letter marked Exhibit 25 and received in evidence, being as follows:)

PLAINTIFF'S EXHIBIT 25.

October 24, 1902.

Hon. Wm. B. Ridgely, Comptroller of Currency, Washington, D. C.

80 DEAR SIR: Referring to yours of the 21st inst. in relation to report of examiner, our Mr. Bump, the President, is now in Washington and I have asked him to call at your office.

The other matters will be taken up at once and will be fully explained by Mr. Bump.

Respectfully yours,

M. M. ANDREWS, *Cashier.*

Letter from witness to Orrin Bump dated October 24, 1902, received in evidence and marked

PLAINTIFF'S EXHIBIT 26.

Oct. 24, 1902.

Orrin Bump, Esq., Washington, D. C.

MY DEAR BUMP: At the suggestion of the directors I wired you today to call on the Comptroller of the Currency and see copy of his letter of the 21st inst. relating to report of examiner.

It was considered at Board meeting today and fully discussed, and I was requested to advise you of their action.

The following resolution was adopted: "On motion of Jas. E. Davidson, director J. W. McGraw was instructed to visit parties owing Maltby Lumber Co. on whom we hold drafts, and learn the status of such accounts up to date of visit." Mr. McGraw will start the first of next week, and endeavor to ascertain what amounts those companies on whom we hold drafts actually owe Maltby, with a view of verifying same. He will take letters of introduction and authority and if possible, get written statements from all. The liability of M. is not being reduced as rapidly as we expected it would be. At present it amounts to \$402,060.91, a reduction since last June of \$63,861.47. We are taking as you know, very little new business from him and are trying to handle the account as conservatively as possible, and not embarrass him.

The Board instructed me to ask Mr. M. for a statement of his affairs, which I will do upon his return to the city tomorrow.

Sincerely yours,

M. M. ANDREWS, *Cashier.*

(Witness resumes:)

The Comptroller's letter was submitted to the Board of Directors.

81 The Board of Directors inspired my reply to that letter. This was done at the directors' meeting of October 24, 1902. The matter was discussed at that meeting by the directors present to the extent that the resolutions were passed, which I think I quoted to Mr. Bump. The "M" referred to in that letter was Mr. Maltby. Regarding the reference to Mr. McGraw's instructions, my impression is that he made an examination of part of the property at least. Where I spoke in this letter of the present liability amounting to \$402,060.91, I got those figures from the books;—remains on the drafts, we were taking payments on them. Those books are on the way to the court now. That was a correct computation of the amount of the Maltby indebtedness at that date. The statement in the letter that the liability had been reduced \$63,861.47 since June 1902 was also obtained from the books. That was a correct statement from the books of the amount of the reduction. Mr. Bump was in very poor health at that time, October 1902. He was on leave of absence and went to Fortress Monroe on account of poor health. He died in 1906 I think. Before his death he was living in California two years. He got leave of absence on November 7, 1902, and was not active in the bank after that time. When he left for Fortress Monroe he had six months' leave of absence. After he returned to Bay City, he was in the bank for a while but his health was very poor. He died October

4, 1906. He never in fact returned to active participation in the affairs of the bank after he got his leave of absence on November 7, 1902, on account of illness.

Thereupon plaintiff introduced in evidence Exhibit 27 as follows:

PLAINTIFF'S EXHIBIT 27.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, May 13, 1903.

Mr. Orrin Bump, President the Old Second National Bank, Bay City, Michigan.

SIR: As heretofore advised too large a proportion of the bank's funds have been used to take up drafts of the Malthby Lumber Co. upon various railroad, telegraph and telephone companies. This line is in no sense commercial paper as contemplated by section 5200

U. S. R. S., and is considered a source of danger to the bank.
82 This accommodation should therefore be reduced to not more than ten per cent of the bank's capital as rapidly as it can be safely done.

An early reply to this letter is requested.

Respectfully,

T. P. KANE,
Deputy and Acting Comptroller.

(Witness resumes:)

This letter was received by me while in charge of the bank. I submitted it to the Board of Directors for consultation at the next meeting after it was received. My answer to this letter was authorized by the directors.

Q. In these transactions and the correspondence with the Comptroller in regard to the Malthby matter, did you act upon your own responsibility or upon the responsibility of and after consultation with the directors in each case?

A. Those matters were always referred to the board and any correspondence done in my name was by direction of the board.

Thereupon plaintiff introduced in evidence

PLAINTIFF'S EXHIBIT 28.

May 19, 1903.

T. P. Kane, Deputy and Acting Comptroller, Washington, D. C.

DEAR SIR: Replying to yours of the 13th inst. relating to examination of this bank on the 28th ultimo, will say that the lines to which you call our attention as being in excess of the limit prescribed by section 5200 U. S. R. S., will be reduced as speedily as possible.

The line of the Malthby Lumber Co., consisting of drafts on railroad, telephone and telegraph companies, is receiving the most

thorough attention of the officers and directors of the bank. We have just taken a line of real estate security on account of the same, and have now in contemplation to proceed in the reduction of their line with us as fast as can be done with safety.

Respectfully yours,

M. M. ANDREWS, *Cashier.*

Objected to as incompetent; overruled; exception for the defendants.

83 The Court: I will admit this in evidence simply on the question of knowledge of this line and the conditions surrounding it. I propose to permit plaintiff to show the complete history of the transaction. No recovery can be had in this case because of the "excess of ten per cent" line.

Mr. Clark: We do not claim any liability based upon that particular violation of the statute.

(Witness resumes:) All of the officers and directors of the bank were giving their attention to the matter at that time so far as I know. I think it first became known to us, that the account was in that condition about the time the first letter was received from the Comptroller in 1902 and from that time on an examination was made as thoroughly as possible and reductions secured as fast as possible.

Q. Then will you explain the circumstances causing the reduction from \$465,000.00 in June 1902 down to \$402,060.91 in October 1902?

A. We still understood that the values were there and that payments would be made. We had not heard from the company on which the drafts had been drawn at that time and it was simply the impression in the bank by myself and the directors, so far as I know, that the accounts were good,—all of them were good for what they called for.

Q. What was the cause of that expectation of that reduction during those months that was not fulfilled,—referring to your statement that this liability was not being reduced as rapidly as you expected.

A. We expected that their drafts would be paid but they were not paid as rapidly as we thought they would be.

In the fall of 1902 I wrote certain letters to some of the Maltby drawees for information. I have these letters here. These were replies to the letters which I wrote in pursuance of the resolution adopted at the directors' meeting of October 31st, 1902. These letters were all written in the same form and about the same time. Some were returned with notations on them. All of these letters were received by me in due course through the mail and in reply to letters of the general purport of my letter of October 31st to the Michigan Central Railroad Company.

The letter last referred to was introduced in evidence

PLAINTIFF'S EXHIBIT 29.

(Letter Head) Old Second National Bank,

BAY CITY, MICH., Oct. 31st, 1902.

Michigan Central R. Co., Detroit, Mich.

DEAR SIR: This bank holds drafts on you made by Maltby Lumber Co. for amounts represented by Bills of Lading and inspection certificates attached, on which we have advanced funds with the understanding that your remittances for sums due them will be made direct to us.

For the purpose of verifying this account, we write to ask you what amount is now due Maltby Lumber Co. from you on their shipments according to your books, also what shipments in transit not credited up.

Kindly give us this information and oblige.

Yours respectfully,

M. M. ANDREWS, *Cashier.*

(In ink:) Lumber	611.95
Ties... { Oak ties	52.80
{ Cedar	402.79

J. R. DUTTON, *Pur. Agt.*

The other letters referred to and produced by the witness were marked Exhibits 30 to 55 inclusive, and introduced in evidence. They were in substance as follows:

Exhibit 30 was a letter from Andrews, Cashier, to the Indiana Railroad Company, South Bend, Indiana, dated October 31, 1902, in the same form as Exhibit 29, on the bottom of which was endorsed in ink the following reply.

8-21-02.	1526	ties 47	717.22
26	977	ties 47	459.19
			<hr/> 1176.41
Less frt.,			35.10
			37.71
			38.52
			37.08
			34.47
			<hr/> 182.88

(Name stamped.)

12-2151

Amt. owing by Indiana Railway Company,

J. B. McCANA, *Treasurer.*

\$993.53

85 Exhibit 31 was a letter dated November 1, 1902, from the Western Electric Company to the Bank purporting to reply to the bank's letter of October 31st, stating that the writer had no record of receiving bills of lading from the Maltby Lumber Company and requested that they be forwarded at once.

Exhibit 32 was a letter dated November first from the Public Lighting Commission of the City of Detroit to the Bank replying to the bank's letter of October 31st and stating that the writer had given an order to the Maltby Lumber Company for 75 poles at \$2.00 each but that the writer could not state the amount due until after the poles had been inspected and the inspector had reported.

Exhibit 33 was a letter dated November 1, 1902, from the Reserve Construction Company, Detroit, Michigan, to the bank, stating that the writer's books showed a balance due to the Maltby Lumber Company of \$456.13 for which an order was held directing payment to the bank.

That the writer had no other material ordered or in transit from the Maltby Lumber Company.

Exhibit 34 was a letter dated November 1, 1902, from the Citizens Telephone Company, Grand Rapids, Michigan, to the bank as follows:

"Yours of October 31st, at hand. It is unfortunate perhaps that we did not understand the arrangement of the Maltby Lumber Company with you. This Company now owes, according to our books, less than \$500 to the Maltby Lumber Company, recent bills. We sent them on the 24th ult., our check for \$1,000 direct. The writer knows of no shipment in transit on credit. It is presumed that the Maltby Lumber Company will take care of its draft direct, and hoping to hear that this is the case and the situation is entirely satisfactory, we remain,

Very sincerely,

CITIZENS TELEPHONE CO.

(In ink:) E. B. FISHER, Sec.

Exhibit 35 was a letter dated November 3, 1902 from the Des Moines City Railway Company of Des Moines, Iowa, to the bank and reading as follows:

"Your letter of October 31st to hand, and in reply will say that we are not aware that we owe the Maltby Lumber Company anything. All bills have been paid."

Exhibit 36 was a letter dated November 3, 1902 from the Valley Telephone Company, Warren, Arkansas, to the bank stating that the Maltby Lumber Company claimed a balance of \$581.27 which was subject to a deduction claimed by the writer.

86 Exhibit 37 was a letter dated November 3, 1902 from the purchasing agent of the Union Pacific Railroad Company Omaha, to the bank as follows:

"I am in receipt of your letter of the 31st ult. which purports to enclose bills of lading and inspection certificates.

The letter was received without enclosures."

Exhibit 38 was a letter from the bank to the Fire Commission of

Detroit in the same form as Exhibit 29 upon the bottom of which the following reply was written in ink:

"Have just received from our Supt. of Telegraph "O. K'd bill of Maltby Lumber Co. for \$987.50. He has delayed the "O. K." on account of a few poles that were defective. If the Maltby Co. have assigned claim to you send me assignment in duplicate by return mail in order that I may put bill in way of auditing without delay."

Exhibit 39 was a letter dated November 3, 1902 from the Toledo and Western Railway Company, Sylvania, Ohio, to the bank, as follows:

"Answering your favor of the 31st would say that the only claim held against this company by the Maltby Lumber Co., is one for \$196.68, and this amount is in dispute since it covers excess freight which they claim should be allowed over the contract. We hold receipts from every other item."

Exhibit 40 was a letter dated November 4th, 1902, from the Carnegie Steel Company, Pittsburg, Pa., to the bank as follows:

"Answering your favor 31st, would advise we have received no statement of account from Maltby Lumber Co. showing dates and amounts of their bills against us assigned to you, which would be necessary before we could make any payment to you for their account. If you will kindly have them forward either bills assigned to you individually or statement of account, assigning such bills as have already been rendered, we will give your request our prompt attention and communicate with you further."

Exhibit 41 was a letter dated November 4, 1902, from the Detroit & Mackinac Railway Company, Detroit, to the bank as follows:

87 "In answer to yours of October 31st, concerning the indebtedness of this Company to the Maltby Lumber Co., would say that the only thing that this office shows that we owe them is a claim of \$551.37. It is possible there may be other claims pending adjustment in the Gen. Freight Office at Bay City. The matter which I advised you about is the only one actually ready for payment. I might add that I have had no instruction from the Maltby Lumber Co., to pay the same to any other person than themselves."

Exhibit 42 was a letter dated November 4, 1902, from the Grand Rapids and Indiana Railway Company, Grand Rapids, to the bank, as follows:

"Replying to your letter of October 31st, in relation to amount due Maltby Lumber Co. for material furnished.

We have on hand now vouchers in favor of the Maltby Lumber Co. amounting to about \$500. As to verifying statement they have made to you it will be next to impossible for several reasons; purchases are made from the Maltby Lumber Co. on a contract for furnishing cross-ties and as fast as the ties are received and inspected, pay-rolls are made out and I understand remittances are made to you by our Pay Master for this.

We also buy lumber from time to time from them. For this material vouchers are made in their favor and usually sent to them once

a month. From this you will understand that this office has no data that would enable you to verify the Lumber Company's statements.

We have had two requests from the Maltby Lumber Co. recently to send to you direct vouchers in their favor. This we cannot do as we require vouchers to be receipted by the party in whose favor they are made and accept no orders for such payments.

If you will have the Maltby Lumber Co. make out their bills payable to your order, vouchers will be made payable to you and can be receipted by you for their account."

Exhibit 43 was a letter from the bank to the Chicago, Milwaukee and St. Paul Railroad Company, dated October 31, 1902, in the same form as Exhibit 29 on the bottom of which was endorsed various initials and memoranda showing that the letter had been referred to various officials of the Railroad Company for reply. The reply appears below as Exhibit 49.

Exhibit 44 was a letter dated November 5, 1902, from the South Bend and Southern Michigan Railway Company, South Bend, Indiana, to the bank, stating that the writer owed the Maltby Lumber Company \$2,814.43 on invoices due and \$2,036.04 less \$291.51 freight and other charges on invoices not yet due.

Exhibit 45 was a letter dated November 5, 1902, from the Railways Company General, Philadelphia, to the bank, replying to the bank's letter of the 31st and stating that the writer could not give the information desired, and had referred the matter to the Superintendent of construction. The letter written by the latter appears below as Exhibit 50.

Exhibit 46 was a letter dated November 5, 1902 from the Detroit United Railway, Detroit, to the bank replying to the bank's letter of the 31st and stating that the total amount of outstanding invoices of the Maltby Lumber Company was \$1,416.96 but that one item was in dispute.

Exhibit 47 was a letter dated November 6, 1902, from the Toledo Railway and Terminal Company, Toledo, Ohio, to the bank replying to the bank's letter of October 31st and stating that the amount due the Maltby Lumber Company was \$849.78.

Exhibit 48, was a letter dated November 7, 1902, from the Cincinnati, Hamilton and Dayton Railway Company, Cincinnati, Ohio, to the bank as follows:

"Answering your letter of October 31st, would advise that it will take considerable work to look up all the invoices against us of the Maltby Lumber Co. If you will give us the dates of shipments, we can very readily then say if they are correct. The Maltby Lumber Co. have given us no notice to pay their bills to you."

Exhibit 49 was a letter dated November 7, 1902 from the Chicago, Milwaukee & St. Paul Railway Company, Chicago, to the bank, replying to the bank's letter of October 31st and stating that the writer owed the Maltby Lumber Company for 28,084 ties at 47 cents amounting to \$13,199.48 from which freight charges were to be deducted.

Exhibit 50 was a letter dated November 7, 1902, from the Superintendent of the Railways Company General at Kalamazoo, Michi-

gan to the bank stating that a voucher was being prepared for the Maltby Lumber Company in the sum of \$365.00 and that the Maltby Lumber Company had also presented a bill of \$3090.00 which the writer could not verify and that had been already paid.

89 Exhibit 51 was a letter dated November 8, 1902 from the Lane Construction Company, Jamestown, New York to the bank, replying to the bank's letter of October 31st and stating that they owed the Maltby Lumber Company for goods delivered \$228.00, less freight \$34.11 and that there was also an invoice in transit amounting to \$343.00 less freight.

Exhibit 52 was a letter dated November 8, 1902, from the Milwaukee Electric Railway & Light Company to the bank replying to the bank's letter of October 31st, stating that the writer's account with the Maltby Lumber Company was balanced but that a carload of cedar posts had been ordered and shipment was shortly expected.

Exhibit 53 was a letter, dated November 14, 1902, from the Western Union Telegraph Company to the bank as follows:

"Replying to your letter of October 31 wherein you ask what amount is still due Maltby Lumber Co. on shipments made by them to this company. This is to advise you we are unable to give you the information as requested in your letter as our superintendent made orders on the Maltby Lumber Co. direct and we are not notified of the orders until their bills are received by us. The Maltby Lumber Co. are in a better position to give you the information that we are.

If you can secure a statement showing what shipments they made and on what order numbers of ours they were shipped we can advise you if the bills have been passed for payment."

Exhibit 54 was a letter dated November 10, 1902, from the Purchasing Agent of the American Telephone & Telegraph Company at New York, to the bank, as follows:

"I have your letter of the 31st ultimo addressed to this Company at Philadelphia, inquiring as to our account with the Maltby Lumber Company.

In this connection, I beg to say that at present we have no outstanding bills unpaid for poles shipped to us by these people but according to our contract we are to pay the Maltby Lumber Company in full for all poles which they hold for our account as of November 1st, 1902, and we are now passing their bills for these poles for payment.

We have already paid 50 per cent on account of these poles and the balance is now due the Maltby Lumber Co. They are carrying for our account at present in the neighborhood of 12,000 poles."

90 Exhibit 55 was a letter dated November 17, 1902, from the Saginaw Suburban Railway Company, Saginaw, to the bank, replying to the bank's letter of the 31st and stating that the writer could not give the exact amount of its indebtedness to the Maltby Lumber Company but that it was between five thousand and six thousand dollars for which orders had been already signed for payment to the bank.

Certain other letters were produced by the witness, identified and introduced in evidence as follows:

Exhibit 56 was a letter dated January 19, 1903, from the Western Union Telegraph Company, New York City to the Bank as follows:

"Replying to your letter of the 14th instant, concerning the Maltby Lumber Company's sales to this Company, I do not, nor does our Auditing Department, know of your holding our letter, stating that payments will be made direct to you. Payment to you has been made, however, of such of their bills as have contained written directions to do so. As to your obtaining acknowledgment of poles billed by them to us, which we have actually received, that will have to be arranged, if it is practicable, with our Western Purchasing Agent and Storekeeper, Mr. S. E. Mason of Chicago, Illinois, whose certificate to that effect would be within his authority. Any bills now due will be remitted for soon. With purchases aggregating several million dollars a year, made from several thousand dealers throughout the entire United States, the impracticability of safe guarding their bank credits is obvious."

Exhibit 57 was a letter dated May 21, 1903, from the Chicago & Northwestern Railway Company, Chicago, to the bank as follows:

"Complying with your favor of the 19th inst., relative to account of the Maltby Lbr. Co. Our books do not show that any item in favor of the Maltby Lumber Company is unsettled and we would be pleased to know what amount you are carrying as outstanding."

Exhibit 58 was a letter dated May 20, 1903, from the Michigan Central Railroad Company, Detroit, as follows:

"I beg to acknowledge receipt of your letter of the 19th inst. In reply would say that all amounts due the Maltby Lumber Co. which were payable to you prior to Jan. 1st, 1903, have been paid by our Local Treasurer.

If you will send me a statement, we of course will be glad to check it up. On the old tie contracts there are still payments due for April deliveries."

91 Exhibit 59 was a letter dated May 20, 1903, from the Grand Rapids and Indiana Railway Company, Grand Rapids, Michigan, to the bank, as follows:

"Relying to your letter May 19th inquiring about our indebtedness to Maltby Lumber Company on old contracts, have to say that the only vouchers in the Treasurer's office in favor of Maltby Lumber Company are two small ones, \$6.24 for overcharge and \$7 for cedar posts which I am sending to them today. We made a payment of \$180.00 on May 14th. We have paid for all ties delivered under old contracts."

Exhibit 60 was a letter dated May 20, 1903, from the Chicago Milwaukee & St. Paul Railway Company, Chicago, to the bank, as follows:

"In reply to your letter of the 19th inst, would say that everything that this Co. owes to the Maltby Lumber Co. for cross ties furnished has been paid long ago. There is nothing more due them."

Exhibit 61 was a letter dated May 21, 1903, from the Railways Company General, Philadelphia, to the bank, as follows:

"Replying to your favor of the 19th inst. would state that we owe nothing to the Maltby Lumber Co. either on account of the Railways Company General or of any of its underlying properties prior to their invoice of April 7th. Same was billed to the Michigan Traction Co. and this, together with the other April invoices and the one for May 1st, will be remitted for on the 25th inst."

Exhibit 62 was a letter dated May 21, 1903, from the Purchasing Agent of the American Telephone & Telegraph Company at New York, to the bank in reply to the bank's letter of May 19th, as follows:

"I have your letter of the above date, and in reply thereto I beg to advise you that we have paid the Maltby Lumber Company in full for all poles accepted by us from them prior to Jan. 1st, 1903. We owe this firm no money on account of old contracts."

Exhibit 63 was a letter dated May 24, 1903, from the Western Telegraph Company at New York, to the bank as follows:

"Answering you letter to the company of 19th inst., so far as we know here we do not owe the Maltby Lumber Co. anything on poles sold to us previous to January 1st, 1903.

I have made inquiry of our Western Purchasing Department, to ascertain whether there are any such bills that it has not yet passed on for payment."

92 Exhibit 64 was a letter dated May 23, 1903, from the supply department of the Western Union Telegraph Company, at Chicago, to the bank, as follows:

"Our auditor informs me that you wish to know if the Telegraph Company still owes the Maltby Lumber Company anything on contract pole orders filled by them previous to January 1, 1903, and the amount if any. In reply to this I have to state that every bill of the Maltby Lumber Co., against the Telegraph Company for poles supplied previous to January 1, 1903, has been paid.

In this connection I beg to repeat what has before been said that, while we as an accommodation, use every endeavor to comply with the stamped request on the bills of that company that remittances shall be made to your bank, we disclaim all responsibility for any errors that may occur in that connection, as we cannot be responsible for a clerical error which might arise through a remittance being made direct to the Maltby Company. The only way in which you could ascertain positively whether any bills have been paid direct to that company would be to obtain from me, as heretofore, a list of all bills received from them within the period which you desire to check and if you will give me the limits in which to search and pay the clerical help as heretofore, I shall be glad to send you such a statement."

Exhibit 65 was a letter dated May 28, 1903, from the Grand Trunk Railway System at Montreal to the bank, as follows:

"Referring to your favor of the 19th inst., addressed to this company, I beg to advise you that we do not owe Maltby Lumber Company anything for ties supplied on contract previous to Jan. 1st, 1903."

Witness resumes.

These letters were referred to the Board on receipt of the letters from time to time. They were filed away afterwards. They were attached in this form for the purpose of bringing them into court.

Mr. T. A. E. Weadock: The letters should not be read until I have an opportunity to cross examine the witness regarding each letter as offered. Unless any particular letter was brought to the attention of the defendants, they would not be competent in the case.

The Court: They are part of the history of the case. The jury will not consider anything not within the knowledge of the defendants.

Mr. T. A. E. Weadock: Exception.

Q. What do you say in regard to your keeping the members of the Board posted in regard to the Maltby account?

Mr. T. A. E. Weadock: Neither of these defendants might be present and yet the Board might be in session. There might be a majority of the board.

The Court: Objection overruled; exception.

A. My custom was to report any additional information as I received it in relation to the account to the board from time to time and the condition of the account.

Those reports were made contemporaneously from time to time as I got the information.

Mr. Humphrey: I would like to ask the witness a question on the subject of these letters.

(Examination by Mr. Humphrey:)

Q. Did you show Exhibit 29 to Mr. McGraw?

A. I could not say I did.

Q. Did you show that letter and that reply to Mr. Chesbrough?

A. I could not say positively.

Mr. Humphrey: I ask that that letter be stricken out until it is shown that they have seen it.

The Court: The motion is denied.

Exception.

Mr. Humphrey: We ask that all of these letters be read subject to the exception that they are incompetent until it is proved that they were brought to the attention of Mr. McGraw and of Mr. Chesbrough.

The Court: You may have the benefit of an exception.

(Witness resumes:) I have here a list (Exhibit 66) that I made of these accounts that are mentioned in these letters with pencil memoranda in the margin showing the results of the letters. This statement was prepared on or about October 23, 1902. I understand this to be a correct statement of the amount of drafts outstanding against these several companies at that time. The pencil memoranda in the left hand margin are in my handwriting. These were the amounts reported by the different parties as owing at the time

94 I wrote the letters. They were entered from the letters,—
each one after the letters were written. It is my recollection
that this was one of the documents which was submitted to
the Board of Directors with the other documents, throwing light on
the Maltby account.

Mr. Clark: We offer Exhibit 66 in evidence.

Mr. T. A. E. Weadock: I want to ask Mr. Andrews some questions
in regard to this paper.

(Witness resumes under examination by Mr. T. A. E. Weadock:)
This paper was prepared by the Maltby Lumber Company at my
request. I have no recollection of calling the attention of the Board
individually to it. My testimony is the same as given on the former
trial,—that I have no recollection of calling the attention of either
of the defendants or any of the directors to this computation, that
I used it simply as a memorandum of my own and that I am answer-
ing now from my knowledge of the custom of always reporting to
the board the question of these accounts.

Examination by Mr. Clark:

(Witness resumes:) It would be impossible to say now that any
particular paper was referred to any particular director or group of
directors.

"Maltby Lumber Co."

Nov. 1.

In pencil at left hand margin.

Typewritten.

Maltby Lumber Company.....
American Tel. & Tel. Co.....
Bloomington & Normal Ry.....
Carnegie Steel Co.....
Chicago, Milwaukee & St. Paul Ry.....
Chicago & Northwestern Ry. Co.....
Cincinnati, Hamilton & Dayton Ry. Co.....
Citizen's Tel. Co., Grand Rapids, M. Mich., (In pencil at right).
939.75 12-28.
Des Moines City Ry. Co.....
Detroit & Toledo Shore Line Ry.....
Detroit United Ry.....
Detroit & Mackinaw Ry.....
Fire Commission of Detroit, Mich.....
Grand Rapids & Indiana Ry.....
Grand Trunk Ry. System.....
Indiana Ry. Co., South Bend, Ind.....
Lane Construction Co., Jamestown, N. Y.....
Michigan Central Ry. Co.....
Milwaukee Electric Ry. Co.....
People's Tel. Co., Detroit, Mich.....

Typewritten.

18,494.88	841.19
94,303.16	2,000.00
165.59	1,815.00
195.	1,969.43
28,156.92	987.50
6,184.50	34,038.37
214.20	64,909.45
1,737.90	1,175.47
	571.80
	79,515.90
	208.30
	295.

None.

1.416.96

551 37

1,176.44
182.88

993.53

24.11

1.067.54

None.

456.13

		(In pencil at right.)	
		12-12.	
150.	Public Lighting Commission, Detroit, Mich.....		150.
		(In pencil at right.)	
		1-25.	
	Railways Company, General, Philadelphia.....		8,543.39
	Reserve Construction Co., Detroit, M.....		749.13
	Saginaw Suburban Ry. Co.....		2,479.
	So. Bend & Southern Mich. Ry. Co.....		5,123.
	Toledo Ry. & Terminal Ry. Const. Co.....		905.
	Toledo & Western Ry. Co.....		292.
	Union Pacific Ry. Co.....		810.74
	Valley Telephone Co., Warren, Ark.....		582.57
		(In pencil at right.)	
		1-1.	
	Western Electric Co., Chicago, Ill.....		350.24
	Western Union Telegraph Co.....		44,299.28
	Oct. 23, 1902—Total		\$402,060.91

365.
3,090.

Ret. 5,000. & 6,000.
3,147.59
333.16

(2,814.43
849.78

196.68
581.27

None.

Mr. T. A. E. Weadock: I move to strike out that paper
97 just read for the reason already stated,—not having been
brought to the attention of either of the defendants nor the
board of directors nor to any member of the board.

The Court: Objection overruled.

Mr. T. A. E. Weadock: Exception.

(Witness resumes.)

In explanation of Exhibit 56, I judge that the former letter was
not definite enough and I asked them again and that is an answer.
This letter formed part of the Maltby files which I have already
referred to as having been brought to the attention of the Board.
These other letters of May 1903 marked Exhibits 57 to 65 inclusive
were written in the same way as the other letters sent out by me and
took the same course as the other letters after being received.

Mr. T. A. E. Weadock: I object to them because they were not
brought to the attention of either of the defendants or the board of
directors or any member of the board.

The Court: Overruled. Exception.

Mr. T. A. E. Weadock: I move to strike out all these letters be-
cause they are incompetent, because they are not authenticated,
because they are hearsay, because there is no evidence that the same
party is purchasing agent, because there is no evidence that they
were brought to the attention of either of the defendants and equal
accessibility to the plaintiff and the defendants at that time, because
they were all dated after March 1903 and one of them later than May
1903.

The Court: Motion overruled. Exception.

(Witness resumes.)

I have here a statement marked Exhibit 67. I got the figures
that are in that statement from the books of the bank and from the
drafts themselves. I made the figures myself. The books and drafts
are now in the room here. This paper was prepared and kept by
me for the purpose of keeping in touch with the account as it ran
from day to day and it was always ready for the board to look at
if they desired. I don't know whether I took it into the board
meeting when this subject was discussed. I don't recollect
98 any time. It was used mostly by myself with the president
of the bank in consultation.

Mr. Clark: I will merely offer this paper as a computation of the
amounts of the drafts.

Mr. T. A. E. Weadock: I object to it for the reason that it is not
the best evidence that the books over here are the best evidence, and
for the further reason that it was not brought to the attention of the
board or to the attention of either of the defendants.

The Court: I will admit it in evidence in order to save time. The
testimony shows that this is a summary from the books and I admit
it under the witness' testimony instead of having the books put in
at this time by the plaintiff.

Mr. T. A. E. Weadock: We make the same objection to the books, Your Honor.

The Court: That is covering your objection that it is not the best evidence.

Mr. T. A. E. Weadock: Exception.

Plaintiff's Exhibit 67 was a tabulated statement containing the names of the various Maltby drawees with columns showing the balance due on the drafts against each on the following dates, viz: November 7, 1902, December 19, 1902, January 1, 1903, March 1, 1903, April 1, 1903, May 1, 1903, June 1, 1903, July 1, 1903, August 1, 1903, September 1, 1903, November 1, 1903, and January 1, 1904.

(Witness resumes.)

Mr. Lewis went into the office of the Maltby Lumber Company in January, 1903. He represented the Old Second National Bank. His duties there were to keep account of the Maltby Company affairs. I think he reported to Mr. Davidson who was appointed a special committee to handle that matter. Mr. Davidson was one of the directors at that time.

Q. What do you say as to whether or not the information that he gave to Mr. Davidson was in turn presented by Mr. Davidson at the Board meetings to the Board.

Mr. T. A. E. Weadock: I object to that as anything that was reported to Mr. Davidson as director. Mr. Davidson was president of the bank and they undoubtedly offered to report to him.

The Court: What was reported to Mr. Davidson would not be material. It is what Mr. Davidson reported to the Board and came to the attention of the defendants.

A. I presume that Mr. Davidson reported this from time to time to the board, at the board meetings.

Mr. T. A. E. Weadock: I move to strike the testimony out because it is not shown that the board meetings at which the report was made, that either of these defendants was present, or that he did report and that it is not the best evidence.

The Court: Overruled. Exception.

(Exhibit 68 marked.)

(Witness resumes):

Exhibit 68 is in the handwriting of Mr. Lewis. He handed one of those to me each month. I don't remember whether they went before the board, but I think Mr. Davidson saw them.

Q. State whether or not the statements of this nature were presented monthly to you by Mr. Lewis as a part of the machinery of the board to keep in touch with the Maltby business.

Mr. T. A. E. Weadock: Objected to.

The Court: Overruled. Exception.

A. It was part of the system of keeping account of it. These reports were brought in by Mr. Lewis within two or three days after

the date of each. With these statements of home drafts, Mr. Lewis also submitted statements of accounts receivable. The home drafts included the amount of drafts outstanding against Maltby Lumber Company drawees which were not forwarded for acceptance. The accounts receivable represented what Maltby's books showed was due from the parties named.

Q. Were the accounts receivable statements handled the same way and did they go through the same course as the home drafts?

Mr. T. A. E. Weadock: I object to that as incompetent by the person who did not make the statement. That is not the best evidence.

Mr. Clark: We claim that this with other things is a part of the information which the board had before them at the time. They had this warning; whether it was correct or incorrect, they were warned. These accounts receivable for January 1st, amounted to only \$37,000 as against \$319,000 of home drafts. It was a 100 warning of the worthlessness of this paper.

T. A. E. Weadock: There is no showing that either of the defendants got any notice and they are not chargeable with notice of the books of any part of the Cedar Company.

The Court: Objection overruled.

A. They were received with the statements of the home drafts and filed with them and handled in the same way.

The following statements of home drafts and accounts receivable were thereupon received in evidence subject to certain objections and exceptions as hereinafter stated.

PLAINTIFF'S EXHIBIT 68.

Home Drafts, January 31, 1903.

Amer. Tel. & Tel. Co.....	68,558.07
Chicago, Mil. & St. Paul Ry.....	20,508.24
Chicago & N. W. Ry.....	3,042.10
Citizens Tel. Co. Grand Rapids.....	732.98
Detroit & T. S. Line.....	2,000.00
D. & M. Ry. claims.....	1,321.63
Federal Tel. Co.....	456.63
Grand Rap. & Ind. Ry. Co.....	35,254.54
Grand Trunk Ry. Co.....	60,564.88
Hecla Belt Line Ry. Co.....	1,000.00
Lane Const. Co.....	343.00
Mich. Central Ry. Co.....	71,749.61
Milwaukee & E. Ry. Co.....	299.55
Public Lighting Com.....	150.00
Rys. Co. General.....	8,543.39
Reserve Const. Co.....	749.13
Saginaw Sub. Co.....	2,479.00

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So. Bend & So. M. Ry. Co.....	3,488.40
Union Pac. Ry.....	1,312.53
Valley Tel. Co. Warren, Ark.....	308.27
Western Union Tel. Co.....	36,210.46

 \$319,071.91

Foreign Drafts.

Traverse City L. & M. Ry.....	3,762.12
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PLAINTIFF'S EXHIBIT 69.

Accounts Receivable, January 31, 1903.

	Dr.	Cr.
American Telegraph & Telephone Co.....		\$36,370.54
Chicago, Milwaukee & St. P. R. R. Co..	\$7,577.60	
Chicago & N. W. Ry. Co.....	2,103.76	
Detroit & Toledo Short Line.....	4,997.06	
D. & M. Ry. Claims.....	1,444.23	
Gr. Rapids & Ind. Ry. Co.....	126.18	
Grand Trunk Ry. Co.....	2,202.36	
Hecla Belt Line Ry. Co.....	2,954.22	
Lane Construction Co.....	343.00	
Michigan Central Ry. Co.....	1,371.55	
Public Lighting Co.....	156.00	
Railways Co. General.....	3,103.75	
Saginaw Suburban Co.....	4,813.28	
South Bend & Southern Mich. Ry. Co..	3,284.36	
Union Pacific Ry.....	326.43	
Valley Tel. Co., Warren, Ark.....	302.57	
Western Union Tel. Co.....	7,923.71	
Traverse City L. & M. Ry.....	3,019.72	

PLAINTIFF'S EXHIBIT 70.

Home Drafts, February 28, 1903.

Amer. Tel. & Tel. Co.....	\$68,193.23
Chicago, Mil. & St. Paul Ry.....	14,815.28
Chicago & N. W. Ry.....	2,317.60
Citizens Tel. Co., Grand Rapids.....	732.98
Detroit & T. S. Line.....	2,000.00
Grand Rapids & Ind. Ry. Co.....	32,974.12
Grand Trunk Ry. Co.....	60,564.88
Hecla Belt Line Ry. Co.....	1,500.00
Mich. Central Ry. Co.....	72,847.50
Milwaukee & E. Ry. Co.....	299.55
Rys. Co., General.....	5,413.07

Reserve Const. Co.....	749.13
Saginaw Sub. Co.....	2,479.00
So. Bend & So. M. Ry. Co.....	1,454.99
Union Pac. Ry.....	1,312.53
Valley Telephone Co., Warren, Ark.....	308.27
Western Union Tel. Co.....	35,012.52
Handy Bros. M. Co.....	2,000.00
Pennsylvania Co.	6,729.05
United Tel. Co.....	329.75
	<hr/>
	\$317,489.58

102 Foreign Drafts.

Traverse City L. & M. Ry.....	6,413.93
	317,489.58
Old	296,276.27
	<hr/>
New	\$21,213.31

(Witness resumes:)

The notation "old" and "new" at bottom of Exhibit 70 was made by myself.

PLAINTIFF'S EXHIBIT 71.

Accounts Receivable, February 28, 1903.

	Dr.	Cr.
Amer. Tel. & Tel. Co.		\$36,035.48
Chicago, Mil. & St. Paul Ry. Co.....	\$7,051.69	
Chicago & N. W. Ry.....	1,362.24	
Citizens Tel. Co.....	413.00	
Det. & Toledo S. Line.....	4,997.06	
G. R. & Ind. Ry. Co.....	67.81	
Grand Trunk Railway Co.....	2,453.16	
Hecla Belt Line Ry. Co.....	1,838.76	
Mich. Cent. R. R. Co.....		2,439.94
Railways Co. General.....	118.25	
Saginaw Sub. R. R. Co.....	4,838.28	
South Bend & So. Mich. Ry.....	1,635.48	
Union Pac. Ry. Co.....	326.43	
Valley Tel. Co. Warren, Ark.....	302.57	
Western Union Tel. Co.....	6,496.06	
Handy Bros. M. Co.....	2,324.70	
Pennsylvania R. R. Co.....	8,079.04	
United Tel. Co.....	394.45	
Traverse City L. & M. Ry.....	3,019.72	

PLAINTIFF'S EXHIBIT 72.

Home Drafts, March, 1903.

Amer. Tel. & Tel. Co.....	\$68,193.23
Chicago, Mil. & St. P. Ry.....	19,815.21
Chicago & N. W. Ry.....	2,317.60
Detroit & T. S. Line.....	2,000.00
Grand Rapids & Ind. Ry. Co.....	37,144.60
Grand Trunk Ry.....	63,513.66
Mich. Central Ry. Co.....	81,386.96
Rys. Co. General.....	5,413.07
Reserve Const. Co.....	749.13
Saginaw Sub. Co.....	2,479.00
So. Bend & So. M. Ry. Co.....	1,038.10
Union Pac. Ry.....	1,023.28
103 Valley Tel. Co., Warren, Ark.....	308.27
Western Union Tel. Co.....	32,612.70
Pennsylvania Co.....	3,112.70
United Tel. Co.....	769.00
Bliss & Van Auken.....	900.38
Cleveland Tel. Co.....	696.53
	<hr/>
	\$323,473.04

PLAINTIFF'S EXHIBIT 74.

Home Drafts, April, 1903.

Amer. Tel. & Tel. Co.....	\$67,804.03
Chicago, Mil. & St. P. Ry.....	19,778.80
Chicago & N. W. Ry.....	1,157.44
Grand Rapids & Ind. Ry. Co.....	34,620.42
Grand Trunk Ry.....	67,172.16
Mich. Central Ry. Co.....	70,226.41
Rys. Co. General.....	5,224.94
Saginaw Sub. Co.....	1,856.75
Western Union Tel. Co.....	31,588.48
Pennsylvania Co.....	7,908.33
Trav. City L. & M. Ry.....	3,100.00
Toledo Ry. & L. Co.....	449.76
	<hr/>
	\$310,892.52

PLAINTIFF'S EXHIBIT 75.

Accounts Receivable, April, 1903.

	Dr.	Cr.
Amer. Tel. & Tel. Co.....		\$34,271.91
Chic. Mil. & St. Paul Ry. Co.....	\$519.82	
Chicago & N. W. Ry. Co.....	958.08	
Gr. Rapids & Ind. Ry. Co.....	215.23	
Grand Trunk Ry.....	4,278.70	
Mich. Cent. Ry. Co.....	1,687.70	
Saginaw Sub. Co.....	5,340.07	
Western Union Tel. Co.....	3,706.41	
Pennsylvania Co.....	8,435.62	
Trav. City L. & M. Ry.....	5,959.11	
Toledo Ry. & T. Co.....	848.00	

PLAINTIFF'S EXHIBIT 76.

Home Drafts, July 31, 1903.

	New.	Old.
Amer. Tel. & Tel. Co.....	\$3,538.13	\$61,082.45
Chicago, Mil. & St. P. Ry.....		17,093.93
Grand Rap. & Ind. Ry. Co.....	1,748.84	30,685.44
Grand Trunk Ry.....	6,123.52	60,162.13
104 Hecla Belt Line Ry. Co.....	400.00	
Mich. Central Ry. Co.....		67,991.34
Saginaw Sub. Co.....		1,839.70
Western Union Tel. Co.....	1,005.01	25,505.08
Pennsylvania Co.....	24,887.58	
Columbia Const. Co.....	1,106.10	
Comstock H. & W. Co.....	1,698.03	
Det. United Ry. Co.....	5,103.91	
Gr. N. & Portland C. Co.....	627.00	
Ideal Const. Co.....	1,142.28	
Pontiac, Oxford & North.....	2,067.96	
	<hr/>	
	\$49,448.36	\$264,359.07
	Old.....	264,359.07
	New.....	49,448.36
	<hr/>	
Total	\$313,807.43	

PLAINTIFF'S EXHIBIT 77.

Accounts Receivable, July, 1903.

	Dr.	Cr.
Amer. Tel. & Tel. Co.....		\$29,232.42
Chic., Mil. & St. Paul Ry. Co.....	no entry	
Gd. Rapids & Ind. Ry. Co.....	no entry	
Grand Trunk Ry.....	\$2,563.50	
Mich. Cent. R. R. Co.....	714.87	
Saginaw Suburban Co.....	5,340.07	
Western Union Tel. Co.....	1,457.27	

PLAINTIFF'S EXHIBIT 78.

Home Drafts, August 31, 1903.

	New.	Old.
Amer. Tel. & Tel. Co.....	\$3,837.28	\$58,398.01
Chicago, Mil. & St. P. Ry.....		17,093.93
Grand Rap. & Ind. Ry. Co.....	2,837.77	30,685.44
Grand Trunk Ry.....	3,264.16	53,162.13
Mich. Central Ry. Co.....		67,991.34
Saginaw Sub. Co.....		1,838.70
Western Union Tel. Co.....	4,153.29	25,505.08
Pennsylvania Co.....	21,901.03	
Columbia Const. Co.....	3,600.00	
Det. United Ry. Co.....	4,061.00	
Pontiac, Oxford & North.....	2,067.96	
Toledo & Ohio Cent.....	402.49	
P. M. Ry. Co.....	7,488.09	
	\$53,613.07	\$254,674.63
105	New..... 53,613.07	
	Old..... 254,674	
Total.....	\$308,287.70	

PLAINTIFF'S EXHIBIT 79.

Accounts Receivable, August, 1903.

	Dr.	Cr.
Amer. Tel. & Tel. Co.....		\$28,795.25
Chic. Mil. & St. Paul Ry. Co.....	no entry	
Gd. Rapids & Ind. Ry. Co.....		2,055.35
Grand Trunk Ry.....	3,390.83	
Mich. Cent. Ry. Co.....	1,081.08	
Saginaw Suburban Co.....	5,340.07	
Western Union Tel. Co.....	4,516.58	

PLAINTIFF'S EXHIBIT 80.

Home Drafts, September 30, 1903.

	New.	Old.
Amer. Tel. Co.....	\$58,398.01	\$4,288.40
Chicago, Mil. & St. P.....	17,093.43	
Columbia Const. Co.....		1,090.93
Detroit United Ry. Co.....		1,977.19
Gr. Rapids & Ind.....	30,685.44	639.96
Grand Trunk.....	53,162.13	4,604.85
Mich. Central.....	64,491.34	209.26
Pennsylvania Co.		23,570.82
Pere Marquette		10,718.93
Saginaw Suburban Ry.....	1,838.70	
Western Union Tel. Co.....	25,505.08	7,539.21
	<hr/>	<hr/>
	\$251,174.63	\$54,639.55

\$251,174.63

54,629.55

\$305,814.18

Sept. 30-03.

PLAINTIFF'S EXHIBIT 81.

Accounts Receivable, September 30, 1903.

	Dr.	Cr.
Amer. Tel. & Tel. Co.....		\$27,049.45
Chic. Mil. & St. Paul Ry. Co.....	no entry	
Gd. Rapids & Ind. Ry. Co.....	272.10	
Grand Trunk Ry. Co.....	3,807.51	
Mich. Cent. R. R. Co.....	1,270.34	
Saginaw Suburban Ry. Co.....	5,340.07	
Western Union Tel. Co.....	7,956.85	

PLAINTIFF'S EXHIBIT 82.

Home Drafts, October 31, 1903.

	New.	Old.
Amer. Tel. Co.....	\$4,288.40	\$50,898.01
Chicago Mil. & St. P.....		17,093.93
Gr. Rapids & Ind.....	4,753.97	30,685.44
Grand Trunk.....	11,471.63	53,162.13
Mich. Cent.		64,491.34
Pennsylvania Co.....	6,102.22	
Pere Marquette.....	3,908.56	

Saginaw Suburban Ry.....	.....	1,838.70
Western Union Tel. Co.....	5,920.89	25,505.08
	\$36,445.67	\$243,674.63
	\$243,674.63	Old
	36,445.67	New
	\$280,120.30	

PLAINTIFF'S EXHIBIT 83.

Accounts Receivable, October 31, 1903.

	Dr.	Cr.
Amer. Tel. & Tel. Co.....	.....	\$25,644.45
Chicago, Mil. & St. P. Ry. Co.....	no entry	
Gd. Rapids & Ind. Ry. Co.....	\$2,378.30	
Grand Trunk Ry. Co.....	4,332.04	
Mich. Cent. R. R. Co.....	965.83	
Saginaw Suburban Ry. Co.....	5,340.07	
Western Union Tel. Co.....	7,199.14	

(Witness resumes:)

Exhibit 69 is not in my handwriting. I think it is Mr. J. M. Lewis' or a clerk in Maltby's office.

Mr. Weadock:

It is incompetent for the reason that it seems to be a pencil memorandum. Nobody knows who made it; not made by the witness, not brought to the attention of either of the defendants and it is incompetent and irrelevant.

The Court: Objection overruled. It is admitted.
Exception.

(Witness resumes:)

This statement of home drafts (marked Exhibit 70), contains at the bottom a line of figures and then the word "old" and then another line of figures and a line drawn and then the word "new." That is my handwriting. I made that notation, "old" and "new" when I wrote the statement. The old drafts represented the drafts 107 unpaid under the old management and the new represented the new bills that we were taking after Mr. Lewis was appointed to look after the business in Maltby's office. We still did business with Maltby under a different basis, but that new business was all paid.

Q. In writing to the railroad companies, you refer to what was owing before January 1903. Had that any connection with Mr. Lewis going in there in 1903 and handling the business on a different basis after that?

A. That was part of the system of following out and investigating the condition of this account.

Q. Who originally took into the bank this old paper, you or Mr. Bump?

A. Mr. Bump took that old paper.

The difference between home drafts and foreign drafts is that home drafts were drafts payable in Bay City, and the others payable outside were foreign. The circumstances were the same in regard to all of these statements of home drafts and accounts receivable during the year 1903, they were all brought in in the same way. The handwriting is the handwriting of either Mr. Lewis or of some clerk in the office.

The Court: It will be understood that Mr. Weadock has made his objection to all of these and they are all subject to objection for the reasons already stated.

Mr. Clark: I understood that all these stand on the same footing, and if it will save time I will consent that they all go in subject to the exception.

The Court: That is satisfactory to the court, defendants may have the benefit of an exception each time, and if there is any additional objection, they can make that.

Q. Mr. Andrews, I find this Ex. 79 without date, placed between the Accounts Receivable of July and September; do you know whether that is the August account?

A. That has no date, but it followed July and came before September. I think that would mean it is the August Accounts Receivable. I believe they were. I don't believe that the order was disarranged.

Mr. T. A. E. Weadock: Let me see Ex. 80. Mr. Andrews, can you tell us whose pencil writing this is on Ex. 80, without any heading?

The Witness: I think that is one of the clerks in the office, Mr. Reynolds.

Mr. T. A. E. Weadock: This has no heading or anything, only home drafts, old and new. Was that ever brought to the attention of the directors when Mr. McGraw or Mr. Chesbrough were present?

The Witness: I could not say positively. It was filed from month to month, but whether the directors saw them I could not say.

Mr. T. A. E. Weadock: You never showed them to either of the defendants?

The Witness: Not that I know of.

Mr. T. A. E. Weadock: Objected to for the same reasons stated before.

The Court: Objection overruled. Ex. 80 is received.

(Witness resumes:)

Exhibit 81 includes the old Accounts Receivable and also the new Accounts Receivable which Mr. Lewis was making from time to time

in new business. That would naturally be the condition at that time, late in 1903. I think it includes both the old and the new. It all refers to Account on the Maltby books. After these parties themselves who are named in the home drafts paid all that they owed, then payments on the home drafts after that time were made from the sale of the Maltby assets. Where there is a debit and credit item in these Accounts Receivable, the debit item means the amounts owing from the parties in the Maltby Company, and the credit items, the amount owing by the Maltby Company to the party.

Mr. Humphrey: I move that the credit of \$25,644.45 that is shown in Ex. 83, be stricken out as it appears that it is a credit of the Maltby Company books, and I don't know how it affects this case.

Mr. Clark: At that time this Company had a credit on the Maltby Company's books and there was outstanding against that same Company, \$50,000 of old drafts.

Mr. Humphrey: I submit at the same time that that item should be stricken out of this account.

The Court: Objection overruled. Note an exception.

Q. You have spoken of Mr. Lewis going into the Maltby offices about January 1, 1903, how long did he remain there?

A. Afterwards, ever since. There is no Maltby office now but he was in the office as long as there was a Maltby office and then took the documents to his own office.

Q. I show you Ex. 84 and ask you whose handwriting that is in.

A. In mine. The date is not on it, but I think it was made about the time or a little before Mr. Lewis took charge of the office.

109 I presume it was for the information of the Board from my custom in getting up such statements. I don't remember definitely the date it was made or positively whether it came before the Board but to the best of my recollection, it came before the Board. I got the figures in this statement from the memoranda I kept myself.

Q. I show you an Exhibit attached to Mr. Maltby's deposition, marked for identification "Maltby 1" and I want you to examine it and see if it is a copy of Ex. 84, which we have just mentioned.

A. It appears to be a copy.

Mr. Clark: I offer in evidence Ex. 84 as part of the information that came to the directors about the account.

Mr. T. A. E. Weadock: Mr. Andrews, did you make this statement?

The Witness: I did. It was made for my information and to be laid before the directors.

Mr. T. A. E. Weadock: You think it was made for the information and to be laid before the directors?

The Witness: Yes.

Mr. T. A. E. Weadock: You don't remember whether it was laid before the directors at any time when Mr. McGraw or Mr. Chesbrough was present?

The Witness: I don't know.

Mr. T. A. E. Weadock: Objected to as incompetent and immaterial.

The Court: Objection overruled. Exception.

Mr. Humphrey: We want it understood that we object to all this same kind of testimony. Where the plaintiff himself does not show that the paper was not brought to the attention of these two men or not one of them, that is not competent in this case, and when it is brought to the attention of one, it is not competent against the other.

The Court: For the benefit of counsel, I will say that I am trying the case on this theory, that the plaintiff is permitted to show these entire transactions through the bank, and then the part that these defendants or either of them took in the transactions and then as soon as that has been done, I will permit the jury to say whether or not at the time these reports were made or previous thereto, the

Board of Directors should have charged off that or a certain amount of the Maltby claim and whether or not these defendants or either of them knew at that time or previous thereto, that such amount or any portion of it should have been discharged off and if a certain amount should have been charged off, and they knew it should have been charged off, was that report of the bank showing its condition brought to the attention of the plaintiff, and was the plaintiff thereby deceived and thereby induced to pay the price he paid for the bank stock.

Mr. T. A. E. Weadock: Note an exception.

Exhibit 84 received in evidence as follows:

PLAINTIFF'S EXHIBIT 84, ALSO CALLED EXHIBIT "MALTBY 1."

Maltby Lumber Company Statement.

Statement Oct. 31, '98.

1897—Present worth Oct. 31, 1897.....	4,284.66	
Net profit for year 1898	5,038.56	
Present worth Oct. 31, '98.....		9,323.22
Oct. 31, '98:		
Resources	37,020.97	
Liabilities		27,697.75
Net stock a/c		9,323.22
	<hr/>	<hr/>
	37,020.97	37,020.97

Statement Oct. 31, '99.

1898 Net worth Oct. 31.....	9,323.22	
Net profit years 1899	35,930.22	
	<hr/>	
Present worth		45,253.44
Resources	150,003.38	

Liabilities	104,750.39
Net worth Oct. 31, '99.....	45,253.44
	<hr/>
	150,003.83
	<hr/>
	150,003.83

Statement Oct. 31, 1900.

Oct. 31, net worth	45,253.44
Net Profit	15,310.81
	<hr/>
Net worth	60,564.25

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Statement Oct. 31, 1901.

Worth Oct. 31, '00.....	60,564.25
Net profit year	27,728.91
Net worth	88,293.16
Resources	332,598.13
Liabilities	244,304.97
Net worth	88,293.16
	<hr/>
	332,598.13
	<hr/>
	332,598.13

Statement Oct. 31, 1902.

Worth Oct. 31, 1901.....	88,293.16
Net profit year	97,092.79
Net worth	185,385.95
Resources	597,789.36
Liabilities	412,403.41
Net worth	185,385.95
	<hr/>
	597,789.36
	<hr/>
	597,789.36

(Witness resumes:)

The drafts against the Western Union Telegraph Company, the Michigan Central R. R., the Chicago and Northwestern R. R. Co., the Chicago, Milwaukee & St. Paul Ry. Co., the Detroit and Toledo Short Line Ry., The Detroit United Railway, the Detroit & Mackinac Ry. Co., the Grand Rapids and Indiana Ry. Company, the Grand Trunk Railway Company, the Indiana Railway Company, Railways Company General, South Bend & Southern Michigan Railway Company, Toledo Terminal Railway Construction Company and the Union Pacific Railway Company were not sent forward for acceptance. I am not sure about the Toledo & Western Railway. Some of those were forwarded, as appeared afterwards, that was paid.

Thereupon plaintiff introduced in evidence the daily statement contained in the daily statement books of the Old Second National Bank for the following dates: February 6, 1903, April 9, 1903, June 9, 1903, September 9, 1903, November 17, 1903, March 14, 1903, May 26, 1903, September 16, 1903, and December 16, 1903.

The material items in the exhibits last referred to are as follows:

PLAINTIFF'S EXHIBIT 85.

Daily Statement of February 6, 1903.

No.	Name.	Resources.	Liabilities.
3.	Home bills	891,418.22	
4.	Foreign bills	165,751.94	
5.	Suspended bills	6,973.57	
12.	Taxes	2,481.38	
112	13. Expenses	3,505.14	
	40. Capital stock		200,000.00
41.	Surplus		75,000.00
42.	Profit and Loss		23,987.38
43.	Discount & Interest		9,365.02
44.	Exchange		436.50

PLAINTIFF'S EXHIBIT 86.

Daily Statement of April 9, 1903.

No.	Name.	Resources.	Liabilities.
3.	Home bills	832,132.18	
4.	Foreign bills	159,715.87	
5.	Suspended bills	4,781.96	
12.	Taxes	2,481.38	
13.	Expenses	6,978.84	
40.	Capital stock		200,000.00
41.	Surplus		75,000.00
42.	Profit and Loss		23,662.98
43.	Discount and Interest		17,455.89
44.	Exchange		1,038.96

PLAINTIFF'S EXHIBIT 87.

Daily Statement of June 9, 1903.

No.	Name.	Resources.	Liabilities.
3.	Home bills	799,595.84	
4.	Foreign bills	184,841.24	
5.	Suspended bills	5,890.03	
12.			
13.	Expenses	212.52	
40.	Capital stock		200,000.00
41.	Surplus		75,000.00
42.	Profit and loss		28,948.87
43.	Discount and Interest		1,491.75
44.	Exchange		129.65

PLAINTIFF'S EXHIBIT 88.

Daily Statement of Sept. 9, 1903.

No.	Name.	Resources.	Liabilities.
3.	Home bills	763,556.28	
4.	Foreign bills	174,519.42	
5.	Suspended bills	2,176.81	
12.	Taxes	500.00	
13.	Expenses	5,686.62	
40.	Capital stock		200,000.00
41.	Surplus		75,000.00
42.	Profit and Loss		29,099.14
43.	Discount and interest		10,913.24
44.	Exchange		704.06

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PLAINTIFF'S EXHIBIT 89.

Daily Statement of November 17, 1903.

No.	Name.	Resources.	Liabilities.
3.	Home bills	767,820.97	
4.	Foreign bills	320,830.52	
5.	Suspended bills	7,425.26	
12.	Taxes	5,717.60	
13.	Expenses	8,951.17	
40.	Capital stock		200,000.00
41.	Surplus		75,000.00
42.	Profit and loss		29,353.41
43.	Discount and interest		24,876.91
44.	Exchange		1,211.61

PLAINTIFF'S EXHIBIT 90.

Daily Statement of March 14, 1903.

Capital stock	\$200,000.00
Surplus	75,000.00
Undivided profits (net)	31,612.11

PLAINTIFF'S EXHIBIT 91.

Daily Statement of May 26, 1903.

Capital stock	200,000.00
Surplus	75,000.00
Undivided profits (net)	39,322.11

PLAINTIFF'S EXHIBIT 92.

Daily Statement of September 16, 1903.

Capital stock	200,000.00
Surplus	75,000.00
Undivided profits (net)	30,106.57

PLAINTIFF'S EXHIBIT 93.

Daily Statement of December 16, 1903.

Capital stock	200,000.00
Surplus	75,000.00
Undivided profits (net)	34,911.01

(Witness resumes:)

I have here the old drafts and accompanying papers that made up the amount that finally went into the demand notes of the Maltby Cedar Company. They are in this box covered with red leather. This is the same box that I delivered to Mr. A. W. Clark and from which he made his tabulation of the contents. These are the papers that finally went into the same \$270,000 demand notes.

Plaintiff's Exhibit 23 being the summary of the minutes of the directors' meetings was thereupon read to the jury, subject to certain exceptions and objections as hereafter noted.

114 Defendants objected to the reading of minutes of meetings from which one or both of the defendants were absent.

Defendants also suggested the following additions to the summary:

At the election in January 1903, the following officers were elected: Orrin Bump, president; James Davidson, Vice President. M. M. Andrews, Cashier, C. M. Bump, Assistant Cashier and Teller. Mr. Andrews' salary was increased, such increase to continue during Mr. Bump's absence or to the limit of his six months' absence.

The following was added to the summary of the meeting of September 4th, 1903:

"The following expression upon the withdrawal of Mr. Orrin Bump from his official connection with the bank was unanimously adopted: We, the undersigned officers and directors of the Old Second National Bank regret exceedingly the decision of our President, Orrin Bump, to sever his connection with this bank as its chief officer. While lamenting the seeming necessity of his action on account of continued ill health, we each and all take this opportunity to express our appreciation of his labors as cashier and president of this institution, the welfare of which has been his ambition so many years. We note with pleasure his many acts of courtesy to us, his associates and his tactful and unostentatious manner in discharging his various duties as citizen and officer. With sincere wish and hope

that he may speedily recover his broken health, we subscribe ourselves, his friends, signed by the full Board."

(Witness resumes:)

I was elected a director at the same time that Mr. A. M. Chesbrough was elected. After that time there were two Chesbroughs on the Board. Mr. A. M. Chesbrough was living in Toledo at the time, and was seldom present. I don't know that he was ever present at our meetings. Where it says Chesbrough, it means Mr. Frank Chesbrough. I was present at the Directors' meeting of November 21st, 1902, when Mr. Maltby appeared before the Board. At that meeting he consented to turn over his property to the bank. Where the minutes show that dividends were declared by the Board during the years 1902 and 1903, those dividends were actually paid. Checks were sent out immediately after the declaration, after the first of the month.

Mr. Clark: We offer in evidence the sixth section or paragraph of the Articles of Association of the bank. These are signed by Messrs. McGraw and Chesbrough.

115 Mr. T. A. E. Weadock: Objected to as incompetent and immaterial, as that fixes the duties of the Directors and they could not give themselves any greater powers or any less.

The Court: Objection overruled. Exception.

Received in evidence as Exhibit 95 as follows:

PLAINTIFF'S EXHIBIT 95.

Articles of Association.

"Sixth." The Board of Directors, a majority of whom shall be a quorum to do business, shall elect one of its members President of this Association, who shall hold his office "unless he shall be disqualified, or be sooner removed by a two-third vote of all members of the Board" for the term for which he was elected a Director.

The directors shall have power to elect a Vice President, who shall also be a member of the Board of Directors, and who shall be authorized, in the absence or inability of the President from any cause, to perform all acts and duties, pertaining to the office of President, except such as the President only is authorized by law to perform, and to elect or appoint a Cashier and such other officers and clerks as may be required to transact the business of the Association; to fix the salaries to be paid to them, and continue them in office or to dismiss them, as in the opinion of a majority of the Board, the interests of the Association may demand. The Directors shall have power to define the duties of the officers and clerks of the Association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of Directors shall be held, and to appoint judges of the elections; to make all by-laws that it may be proper for them to make not inconsistent with law, for the general

regulation of the business of the Association and the management of its affairs, and generally to do and perform all acts that it may be legal for a Board of Directors to do and perform under the revised statutes aforesaid.

In witness whereof, we have hereunto set our hands this twenty-eighth day of March, eighteen hundred and ninety-four.

(Signed)

J. W. MCGRAW,

Bay City, 100 shares.

FRANK P. CHESBROUGH,

Bay City, 125 shares.

AND OTHERS.

Q. Referring to the documents in the red box, state whether
116 or not these are the original documents that came into the bank with these drafts as originally discounted?

A. When the drafts were first discounted, the papers attached to all of these drafts were pinned to the drafts that we discounted.

Q. In a general way, Mr. Andrews, and so far as you can answer the question, what efforts were made to realize on the Maltby assets,—to realize the best possible amount on them; what has been done in the way of selling them and realizing on them?

A. My recollection is that the Board appointed a committee, one of whom was Mr. Davidson, to handle the matter in connection with Mr. Lewis and to use their best judgment to realize on the property.

Q. How much of the property has already been realized upon, or how much has not been realized upon, if any?

A. The account is closed now and everything is paid off and there is nothing standing in the assets of the bank on the account.

Q. How much has been charged to profit and loss in all?

A. \$226,000.00.

Q. So far as concerns the manner in which the assets were realized upon, as to whether they were all sold at once under the hammer or in parcels or from time to time, explain a little more fully.

Mr. T. A. E. Weadock: Object to that as leading, immaterial and incompetent in this case. Leading from the form of it. Incompetent from the fact that it doesn't make any difference what the assets brought. It doesn't make any difference what amount they negatively charged off.

Mr. Humphrey: And further that is what they found the losses to be in 1905 or 1906, as I understand it, to be clear down to the present time and we certainly object to their making any such showing as that.

The Court: I will admit it as showing the transaction in the bank, but I caution the jury that the question which will limit the liability of the defendants is how much of the claim should have been charged off previous to the time these reports were made in 1903, and further, did the defendants know at that time that it should be charged off; and further than that, did they cause, or permit these assets to remain upon the books of the bank at their full value after they knew that they should be charged off.

Mr. Humphrey: As I understand your honor, you will leave it to the jury as to how much should be charged off if any?

The Court: How much, if any?

117 (Question read.)

A. They were not sold at once; they were sold from time to time as opportunities for sales occurred in the judgment of the committee and the Board to the best interests of the bank, and for the protection of the depositors of the bank. So long as the assets were large and the business voluminous, Mr. Lewis was given all necessary assistants and office machinery. That business has been continued up to the present time with Mr. Lewis in charge and he still holds that position as manager of the company.

Q. Did you give him a separate office and the proper clerks and employees so long as he needed them for that purpose?

A. Previous to the time the Maltby Lumber Company was closed he kept that office and equipment. When Mr. Maltby went away and that office was closed, he took the business to his own office.

Q. Do you know of anything in the handling of those assets, Mr. Andrews which in any way resulted in the bank getting less out of them than they ought to have got?

Mr. Humphrey: That is not a question for anyone, the facts as to the amount obtained and as to whether that lumber business was properly handled, or whether he has testified as to how the lumber business should be handled.

Mr. Clark: I ask if he knows of anything which in any way resulted in the bank getting less out of the assets than they should have gotten.

Mr. Humphrey: My objection is that it is not competent as to what he knows, or his judgment. That is not a question for him to answer.

The Court: Objection overruled. Exception.

(Question read.)

A. As a matter of fact I know nothing of the details of the settlement. The figures that I have were taken from Mr. Lewis and compiled from reports made by him, if any, and a Committee was in charge, a committee had it in charge, together with Mr. Lewis. My opinion, my own opinion, is that they managed it to the best interest of all concerned.

Mr. Humphrey: I move to strike out his opinion of what was done.

The Court: It may be stricken out.

Q. Do you know of any fact or circumstance to the contrary?

A. I do not.

Mr. Humphrey: Move that it be stricken out.

118 The Court: Overruled, that may stand.

Mr. Humphrey: In reference to this I want to ask the witness one or two questions. Mr. Andrews, were you ever out to this lumber job of Mr. Maltby while it was being carried on by the bank?

The Witness: No I was not.

Mr. Humphrey: Did you know how they did carry it on?

The Witness: No, I did not.

Mr. Humphrey: Did you know what was done except what you saw right there in the bank?

The Witness: No, I did not. I know nothing about it personally, except what was handed to me as a result.

Mr. Humphrey: I ask that it be stricken out as entirely incompetent.

The Court: I strike out that part quoting his opinion and will let the rest of the answer stand for what it may be worth.

(Witness resumes:) All of the money received from that property that went into the bank has been applied by me on this old indebtedness. The papers taken by Mr. Bump were those on which the losses occurred.

(The witness thereupon identified certain books and records of the bank then present in the court room which were marked as follows:)

Exhibit 96, Stock Ledger.

Exhibit 97, Stock Certificate Book of the year 1903.

Exhibit 98, Domestic Discount Register D.

Exhibit 99, Domestic Discount Register E.

Exhibit 100, Foreign Discount Register.

Exhibit 101, Domestic Discount Tickler from March 1, 1900, to February 28, 1902.

Exhibit 102, Domestic Discount Tickler for 1902 and 1903.

Exhibit 103, Foreign Discount Tickler from March 1, 1900, to February 28, 1902.

Exhibit 104, Foreign Discount Tickler 1902 and 1903.

Exhibit 105, Liability or Discount Ledger.

Exhibit 106, Loose Leaf Liability Ledger.

Exhibit 107, Day Book showing bills discounted, credited daily from November 15, 1901, to August 30, 1902.

119 Exhibit 108, a book of the same nature, dating from September 22, 1902, to November 11, 1903.

Exhibit 109, a book of the same nature, dating from November 12, 1903, to February 16, 1905.

Exhibit 110, Transit Account Book from June 24, 1902, to January 20, 1903.

Exhibit 111, a book of the same nature, from November 26, 1901, to June 23, 1902.

Exhibit 112, a book of the same nature from January 21, 1903, to July 17, 1903.

Exhibit 113, a book of the same nature from July 20, 1903, to February 4, 1904.

Exhibits 114, 115, 116, 117 and 118, deposit ledgers.

Exhibits 119 and 120 General Ledgers or Daily Statement Books.

(Witness resumes:)

I have also in court in a trunk all the deposit slips and discount slips during the years 1902 and 1903. I directed them to be put in there. They have been kept segregated the same as they were here

before. Those are the same deposit slips and discount slips that Mr. A. W. Clark examined and that I produced for him. There is a trunk full of them tied up in bundles.

Cross-examination of Martin M. Andrews.

By T. A. E. Weadock :

Mr. Bump, Mr. Maltby and myself, all originally came from Flint to Bay City. Mr. Bump and Mr. Maltby were especially well acquainted.

The Maltby Lumber Company was a firm name for Alzina Maltby who was the wife of Alvin Maltby, doing business under that name. The capital they started with was obtained by Alzina Maltby mortgaging her home in Bay City. This business started with a small amount and grew to be a very large business. I judge that the annual interest paid by the Maltby Lumber Company to the Old Second National Bank in 1901 and 1902 would be in the neighborhood of twenty-five or thirty thousand dollars.

Q. Now it is said here that he had no capital rating. State whether or not it made any difference in the business he carried on and the way he carried it on?

A. I don't think Mr. Bump regarded it so. It was supposed that drafts drawn with bills of lading were good paper for the bank to take at that time.

The attorney for the Second National Bank from 1901 to 1903 was C. L. Collins who is now Circuit Judge of Bay County. He was not a member of the Board of Directors but was called in from time to time as occasion demanded.

120 Thereupon defendants offered in evidence the discharge in bankruptcy of Alvin Maltby dated December 11, 1902, and taking effect from August 21, 1902.

(Witness resumes:)

The Maltby papers were taken in the first instance by Mr. Bump.

I have looked over the published report of the bank under date of February 6, 1903. At that time there was a large amount of this Maltby paper in the bank. I knew at the time that this item of loans and discounts contained a large amount of the Maltby paper and knew that it was listed in this report at its face value. It was so listed because it was carried so by the bank as discounted paper.

All of the reports published by the bank during the year 1903 were made upon blanks furnished to us by the Comptroller of the Currency. The information that goes to the printer and is published in the newspaper is practically a copy of the daily statement.

The date when Mr. Maltby came before the bank with reference to giving security was, I think, in 1902. He furnished inventories of the land and his property at different times. I had some reports before that I think. Referring to Exhibit 84, my impression is now that it is a statement made from different data we had from the Maltby Lumber Company; from reports made by them as to their

business, their condition and what they had. Many of these reports were in the bank. I got all of those figures in Exhibit 84 from the Maltby Company. I do not know that I had made inquiry from other sources as to the condition of this company and the business they were doing, and do not know whether Mr. Bump did so. Alzina Maltby was not engaged in any other business. Alvin Maltby was really doing this business but doing it in her name or in the name of the Maltby Lumber Company.

Exhibit 84 is in my handwriting. I must have made it from reports from day to day. I think I got it from the reports of the Maltby Lumber Company. I may have got those figures from Mr. Bump, I would not say positively. He left the bank in 1902.

Cross-examination continued.

By Mr. Humphrey:

Q. Had anything occurred between the time you made the statements of September 9th and November 17th that in any way changed your opinion about the Maltby loss?

A. I think so.

121 Q. Now what happened?

A. The discovery that these drafts and bills of lading accompanying them were fraudulent in some measure.

Q. Why Mr. Andrews that was in 1902 that that information was gotten.

A. I thought you said between 1902.

Q. I said between the statement that you verified of September 9, 1903, and the one of November 17, 1903, what occurred between those two statements; that in any way changed your opinion of the value of Mr. Maltby's account?

A. I don't think of anything that would have changed my opinion.

Q. At the time when you made your affidavit and statement in November on November 21st, had you any information then submitted other than you had on September 9th as to the value of his account?

A. We had been investigating and if these letters were received in that interim, I should——

Q. Those letters were in 1902 and you are confusing the dates, Mr. Andrews. The letters were in 1902. Is there anything between September 9th, 1903, and November 17th, 1903, that you know of that in any way changed your opinion?

A. Nothing to my knowledge.

(Witness resumes:)

Prior to the statement of February 6, 1903, Mr. Maltby had turned over his property to the bank and the bank had placed Mr. Lewis in charge of all of Mr. Maltby's property for the benefit of the bank. The Maltby business at that time was a very extensive business scattered over a large territory. There was a large yard at River Rouge and lumber operations at eight or ten different

places in Michigan. My recollection now is that some other member of the board who was a lumberman was placed on the committee with Mr. Davidson.

Q. Did the bank have an examination of the property made?

A. I think it did.

Q. Did they take this inventory that was turned over by Mr. Maltby and deliver that to Mr. Lewis?

A. Yes, those papers were all delivered to Mr. Lewis.

Q. Did Mr. Lewis to your knowledge report to the bank after an examination that he found that inventory correct?

A. Not to my knowledge.

The letters that were introduced in evidence that were received by the bank from different parties were filed with the letters of the bank. They were always open to the inspection of the directors and when they were received, before being filed away, they were referred to the board, and those who were present saw them.

I don't remember distinctly Mr. Woodworth coming to the bank and making inquiries of me about the condition of the bank
122 in March 1903, but my recollection is that he did come into the bank and talk with me about it. I have no recollection now of the conversation. If he came to me and asked me the condition of the bank and I showed him its condition, it would be from one of these daily statements, which would be practically the same kind of a statement as was published by the bank on the dates named.

All of the papers on which a loss was sustained by the bank were taken in the year 1902. The whole line was taken by Mr. Bump and when he left, of course we continued the business and worked it out the best we could. It is not always true that the paper is discounted before the directors hear of it. The starting of the account undoubtedly was considered by the board and a certain line allowed, and then subsequently as the papers were handed in, the directors of course knew of them, about this paper. The discounts were read at the board meetings from the discount register but the paper itself that was discounted would not be actually presented there at the meeting of the board of directors unless called for.

The amount of money that was collected on the Maltby account between October 31, 1902, and October 31, 1903, as shown by my memorandum here was \$68,623.25 and I believe that to be correct. The amount collected during the months of November and December, 1903, was \$14,000.

The property that was turned over as security from the Maltby Lumber Company to the bank represented all the property that I know of that was owned by Alvin Maltby or the Maltby Lumber Company.

The Maltby Cedar Company was a corporation afterwards organized by the attorney of the bank for the purpose of handling this Maltby property. From the time that Mr. Maltby and Alzine Maltby turned over this property as security to the bank, the bank assumed the entire management and control of the Maltby business.

From that time Mr. Maltby had no power or authority to make any contracts or do any business not sanctioned by the bank. He was absolutely out of the business so far as its management or control was concerned. The turning over of the property took place from November 1902 until May, 1903. From the time it was turned over Mr. Maltby was completely controlled by the bank.

I don't recall that any member of the board during the years 1902 and 1903 proposed to charge off any of the Maltby paper.

All of the securities taken in the name of James Davidson were held by him for the bank. He had no personal interest in them whatever. They were made to him direct on advice of counsel because they did not want it disclosed on the record.

123 Redirect examination.

By Mr. Clark:

The stock of the Maltby Cedar Company, outside of that in Maltby's name was all held for the bank and in the name of certain directors of the bank. They did not actually pay any money for the stock. My recollection is that only certain directors of the bank were made directors of the Maltby Cedar Company. The Maltby Cedar Company was merely one of the devices employed by the board in getting rid of the Maltby assets to the best advantage. In regard to the deeds being made to James Davidson without the word "Trustee," Mr. Davidson was a very wealthy man, owning very large property interests. Because of Mr. Davidson's financial standing, the public would not consider it anything unusual for deeds to go on record to Mr. Davidson for large amounts of land. There would not be anything in that situation, so far as I know, to let the public know that this land was held for the bank.

Q. You were asked in regard to your signing these reports. I ask you whether you testified as follows on the former trial of the case. I am reading from page 328.

"Q. In making and verifying the reports of 1903, did you consider anything more than the entries on the books of the bank?"

A. Nothing relating to the value of the paper—is that what you mean?

Q. Yes.

A. The reports were made in compliance to the law. The reports were made in compliance with the directions of the Comptroller, and represented a condition of the books, simply the records that the books showed.

Q. Did you consider anything more than that in making up and verifying the reports?

A. No.

Q. Did you go back of the entry on the books to ascertain the value of assets of various kinds?

A. I did not.

Q. In testifying on your cross examination that certain items on these reports were correct in reply to Mr. T. A. E. Weadock's ques-

tion, did you mean any more than that you thought they were correctly taken from the books?

A. My reply was that they were correct to the best of my knowledge and belief.

Q. Were correct with reference to what and compared with what?

A. With reference to the figures shown by the books."

Q. Did you so testify?

A. I did, and I should testify the same thing again.

I spoke of Mr. Lewis having had no experience in the Cedar business. He had had a wide experience as an accountant. So far as concerned the practical details of the Cedar business, he had foremen in the woods and other assistants. We kept Mr. Maltby's foremen so long as they could be used to advantage. Mr. Lewis did not have all the detail work; his part of the business was keeping the records of the Company. Mr. McGraw and Mr. Chesbrough
124 were both lumbermen and had been lumbermen all their lives, so far as I know. They were active in all lines of lumber business including logging. The Chesbrough brothers had a large logging operation at Emerson, Michigan.

The directors' minutes do not show all the transactions at each directors' meeting. They do not show conferences relating to papers offered for discount. It was never the custom of the board to enter upon the minutes all the business transacted at the meetings. There were many occasions during 1902 and 1903 when I was there that the Maltby matters were discussed by the Board and none of those things are mentioned in the minutes. In addition I understand that the directors had informal meetings in Mr. Collins' office about the Maltby matter. Mr. Collins' office was in the same building as the bank and in the same corridor on the same floor as the Maltby office. I presume Mr. Chesbrough said something about meeting Mr. Collins in Chicago during the winter and that the two made an investigation there. Mr. McGraw also visited the camps and the woods soon after it was ordered by the bank. The minutes show when he was requested to do that and it was soon after that date. During any of the time that the Maltby account was in the bank, I have no recollection of any division or disagreement between any of the members of the board about the Maltby matter.

Referring to Exhibit 67, the red ink entries mean payments on the old drafts the bank then held. These payments were of two kinds, some small amounts and still left and paid by the drawees and the balance, a large amount, paid by Mr. Lewis out of the proceeds of closing up the business. A large proportion of the money was paid out of the general assets of the Maltby Lumber Company.

There was no substantial difference between the claims made by the railroad and telegraph companies and the statements of accounts receivable as they came from the Maltby office.

In regard to Mr. Woodworth's coming into the bank at about the time he bought the stock and asking me for some figures from the books, assuming that I had under consideration the report of February 6th and that he came in to see me a few days before March 14th for comparison, then the natural situation would be that the daily

statement of the bank would show a larger undivided profit than the printed report of February 6th. This would result from the fact that the undivided profits would increase from one dividend until the next dividend and would be larger in March than in February.

When Mr. Woodworth says that the only difference was that the undivided profits were a little bigger, I think that would naturally be the situation. I do not remember what line of credit the directors allowed Maltby or whether they did in fact fix any limit to this line in advance.

I think it is a fact that the Maltby papers were from time to time called for by the board. I was the man that took them into the board when called for.

Mr. Maltby gave his active attention to the business for a considerable time after we put Mr. Lewis in. Mr. Maltby gave his best attention to the business and the property in matters connected with realizing on the assets.

Recross-examination.

By Mr. T. A. E. Weadock:

The bank's attorney, Mr. Collins, was occasionally called upon to attend directors meetings, but not often. After the receipt of the letter from the Comptroller in October 1902, his attendance was more frequent. He gave his attention right along to that matter.

SPENCER O. FISHER, a witness sworn on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Clark:

I live in Bay City, and have lived there for forty years. I am in my seventieth year, and I am a lumberman and banker. In the year 1902, I was living in Bay City. I have known Mr. Frank P. Chesbrough, I think, for twenty-five years. In May 1902 I had a conversation with Mr. Chesbrough about the Second National Bank stock, and this conversation took place on the Grand Trunk train leaving Chicago. I was coming from Chicago to Bay City, which Mr. Chesbrough was, also, doing. We talked in a social way to commence with, and finally referred to the banking business, and then referred to the Second National Bank. Early in that year, I investigated the purchase of Old Second National Bank stock, but I did not make the purchase.

Q. What, if anything, was said by Mr. Chesbrough in regard to that purchase, which you thought of making and did not make?

Objected to as immaterial and irrelevant.

126 The Court: It appears irrelevant and immaterial so far as the defendant McGraw is concerned. If there is anything in the nature of an admission, the testimony should be confined to

the particular defendant making the admission. I will permit the answer as to either one of the defendants.

Exception for the defendants.

A. Mr. Chesbrough said that he would not let me make it.

Q. Did you and he discuss the subject as to whether or not it was his stock, you intended to buy?

A. I inferred it was. It was his stock, for he said it was.

Mr. Humphrey: I submit that the conversation between Mr. Chesbrough and himself is incompetent.

The Court: Objection overruled; exception for the defendants.

Witness continues: He said he had the stock and wanted to dispose of it, but he would not sell it to me when he knew I was the purchaser. My previous negotiations were with Mr. Ames, the broker, and at the time I was talking with him about the stock, I did not know to whom it belonged. Mr. Chesbrough said that the bank would make some large losses, and the stock would be a loss.

Q. Did he give that as his reason?

Mr. Humphrey: I object to that as leading.

Mr. Clark: I think that is leading.

Q. How did this talk that the bank would have losses get into the conversation?

A. He said in regard to the selling of it, he said there would be a loss, he said there would be bad losses, and there would be losses in the value of the stock. I was on a friendly basis with him at that time, and so far as I know there has never been any interruption. I think I have stated the substance of the conversation about this stock.

Cross-examination.

By Mr. Humphrey:

I have been in business in Bay City for forty years, and at one time I was a member of the firm of Mosher & Fisher, but I was not involved in the Mosher & Fisher failure, as this firm never failed. I had nothing whatever to do with the firm of Mosher & Son, although it was the same Mr. Mosher that was in business with me.

127 Q. Mr. Fisher, in your business here as a lumberman, what has been your lumbering business? What kind of business?

Mr. Clark: I do not think that this is in line with the direct examination.

The Court: As to the nature of the business, whether it was a cedar business or a pine business, it does not make any difference in this case.

Mr. Humphrey: Note an exception.

I met Mr. Chesbrough in May, 1902, but do not remember the date. At present, I don't know what time in May it was; I might look it up; that is ten years ago. I was coming from Chicago to

Bay City on the Grand Trunk train. It was the night train, leaving Chicago, I think, at 8:00 o'clock in the evening. I am very positive now that it was in May, 1902, when I met Mr. Chesbrough. Mr. Chesbrough started the conversation between us, but he was not trying to sell me his stock. I suppose Mr. Ames told him that I contemplated buying stock, for he told me that he heard I contemplated buying some, but he said, he would not let me have it. I couldn't say whether there was considerable National Bank stock changing hands at that time or not; neither do I know that the stock of the Old Second National Bank has been dealt in for the last twenty-five years in this city. I never owned any of the stock. He told me that he thought there would be some large losses in discounted paper and losses that the bank would make, but he did not specify as to the kind of losses; he was simply giving his judgment in regard to the matter.

Q. So that any of the officers of the bank knew of them?

A. I couldn't answer that. He knew, he was a director at the time. I think Mr. Bump was the president of the bank.

Q. Was it with reference to Mr. Bump that he was speaking?

A. No, sir. In a general way.

Q. Did you know at the time that Mr. Bump was not in very good health?

A. No, he had so stated that he had not been very well.

128 Witness resumes: At that time, I did not know anything as to the fact that Mr. Bump would not be liable to be connected with that bank very long after that. Only by rumor did I know that he was in failing health, and I did not know that it was on account of Mr. Bump's health failing that Mr. Chesbrough was going to get out of that bank; neither, did I know at that time that Mr. Chesbrough was contemplating moving away from Bay City, and I don't think he told me of his intention to this effect, and as to his moving away a short time after that, I can not answer that, for I do not remember it. Mr. Chesbrough did not tell me that he had left some stock with Mr. Ames for sale; he did not tell me that he left stock with anybody for sale. I did not apply to him to buy stock. Mr. Chesbrough simply said that there would be some large losses, and it would depreciate the value of the stock.

Q. As to what he learned would cause the large losses, he didn't express any opinion on that subject?

A. He did express an opinion on that subject—bad loans.

Q. You understand this to be the expression of an opinion on his part?

A. Expression of his knowledge.

Q. This was given to you as an opinion?

A. His knowledge.

Q. You mean that he had knowledge that there would be losses?

A. Yes, he said there would be losses.

Q. His expectation might or might not be realized?

A. Yes, he felt pretty confident of it.

Q. It was an expression of his opinion?

A. Expression of his knowledge.

Q. Do you mean that a man has knowledge of coming events—that as to the future a man has absolute knowledge?

A. I think he could have.

129 Q. Have you that absolute knowledge of future events?

A. Not absolutely.

Q. Now as to what will take place in the future, the question is man's opinion on the subject?

A. Where things get in bad.

Q. He knows where things go bad? He bases his opinion as to what will happen in the future and he may be wrong and he may be right?

A. That might be—certainly.

I did not at that time buy any bank stock or any other stock.

Regarding that investment I contemplated making I turned the money over to the estate later. There was not any talk about Mr. Whitney in that conversation, neither was there any talk about Mr. Carrington's business with the bank, nor was there any talk about the purchase of stock by Mr. Eddy, at no time was there any talk about Mr. Eddy desiring to purchase stock in the Second National Bank, or that he had purchased stock. I knew both Mr. Charles A. Eddy, and Mr. Selwyn Eddy. I did not know, for I had no knowledge to the effect that Mr. Selwyn Eddy was at that time in May, 1902, a director of the Old Second National Bank. I knew Mr. Chesbrough was a director, because he told me so, and I knew it from the published statement of the bank. I saw the published statements of the bank; I used to glance them over perhaps. There were no persons, indebtedness, or loans spoken of in any way between us. I think I have detailed, so far as I remember all that took place between me and Mr. Chesbrough. Mr. Chesbrough told me that he was the owner of some stock, but I don't think, I don't remember that he stated how much stock he owned. He did not tell me that he did not own any.

Q. You were examined on this subject before, were you? At the trial on May 21—let me see, I will give you the date in moment—this was a deposition taken in the Smalley case. Your testimony taken by deposition in Bay City May 21st, 1906. You remember that, do you not?

A. I don't remember it. I was a witness in the Smalley case. I remember being here in this court room.

Q. Don't you remember of testifying before a commissioner or a Notary Public? Your testimony taken by commission?

A. I don't recall that, sir.

Q. It was here in this court and Judge Swan presided. You remember this conversation that took place in 1902, ten years ago, and you tell us about that, but you don't remember being before a Notary Public and giving your testimony in May, 1906, three years nearer this time that you came to give that testimony?

A. The testimony I gave here was before Judge Swan, and I don't remember—I think I have been sworn twice; I don't know if I have been sworn three times.

130 Q. Were you not examined by Mr. Clark here in Bay City before a Notary Public on the 21st day of May, 1906, in a case pending in Saginaw County, in which Mrs. Margaret A. Smalley was plaintiff, and Chesbrough and McGraw were the defendants?

A. I don't recall it.

Q. Now, to refresh your recollection, was not your testimony taken before Mr. Frank P. McCormick, as Notary Public?

A. I don't recall it, Mr. Humphrey.

Q. At that time, in May, 1906, did you not testify that Mr. Chesbrough told you that he had sold a part of his stock to Mr. Whitney?

A. I don't recall that either.

Q. Didn't you say that he, also, told you at that time that he had sold a part of it to Mr. Eddy?

A. I don't recall it, sir.

Q. Did he not tell you, at that time, didn't you testify that he told you at that time that he then owned no stock?

A. No, I don't recall it.

Q. Did you not then give this testimony? "He told me that he did not own any of the stock then. He said that there was \$1,000.00 still in his name, but that it belonged to Mr. Bump, that it had been assigned to him so as he could act as one of the directors." Did he tell you about it?

A. I think he did.

Q. He didn't own any stock then?

A. At the time on the Grand Trunk train?

Q. Yes?

A. Yes, he did. I don't recollect whether he told me that he owned no stock. I don't recollect whether I swore on May 21st, 1906, that he did tell me that.

Q. Do you remember the facts of that conversation better now than you did?

A. I don't think I would. It was very firmly fixed in my mind, because he was a director of the bank, and I remember what he said, and I censured him for saying that of the bank of which he was a director. I thought he ought to keep that to himself.

Mr. Humphrey: I move to strike it out.

The Court: I think he answered why he remembered it, and I will allow it to stand.

Mr. Humphrey: Exception for defendants.

Q. Mr. Fisher, at that time in May, 1906, do you now say that you did not then remember the conversation as well as you do now?

A. I think I would remember it as well.

Q. Do you now say that these things that you then testified to, did not take place?

A. I just testified, Mr. Humphrey, that he said to me that he had \$1,000.00.

131 Q. Now, Mr. Fisher, do you know the question, Mr. Fisher? Do you now say that these things that you then testified to

did not take place? *Q. Do you now say that the things that you then testified to did not then take place?*

A. I don't recollect what you are reading from there at all.

Q. Do you now say that he then told you that he did not then own any stock in the bank?

A. I do.

Q. You say he didn't tell you that?

A. I do. The conversation in the car I remember very well. I don't recall the testimony I gave before Mr. McCormick in 1906, but whatever it was, it was true. The principal things are fixed in my mind still, and the principal thing was that he had stock and wanted to sell it, and did not want me to buy it on account of the losses and the bank paper; he said the stock would depreciate. He owned stock and didn't want me to buy it. He didn't tell me where the stock was held for sale. He didn't use any names. From what he said, I took it for granted that he had the stock.

Q. If he had the stock himself, why did he have to caution you not to buy the stock?

A. After the stock was offered, he told me this. I didn't know whose stock it was when I talked with him. He told me that he had put his stock with Mr. Ames for sale.

Q. How do you know that stock which Mr. Ames had was Mr. Chesbrough's?

A. Mr. Chesbrough told me that at the time of the conversation. He said that that stock that Mr. Ames had belonged to him.

Q. At that time he was telling you so that you would not buy the stock he owned?

A. No, sir; after I declined to buy the stock. It was after the offer of the stock that he told me. I had declined to buy it and Mr. Ames offered it and then two months afterwards Mr. Chesbrough met me and had this conversation.

Q. Now, at the time you had this conversation, he was then offering the stock itself for sale, as you understood?

A. I didn't understand he was offering the stock.

Mr. Clark: We admit that that is the testimony in a shortened form that Mr. Fisher gave when he was sworn before Notary Public, McCormick, on May 21st, 1906.

Mr. Humphrey: I will read what Mr. Fisher then said. "And I asked him at what price, and he told me at 1.60, and I said to him, that was too high; that it would never return sufficient earnings at that price. He assured me that it was paying ten per cent., and I said to him that even if it was, it was not sufficient at the additional cost of 1.60. I didn't think it was worth it; he finally went out and came back, and said he could sell it, and had been offered 1.55, but that if I wanted it at 1.55, he would let me have it, and I told him I would consider it until the next day, but I decided that I did not want it at that price. He assured me that the bank value was 1.60, and that it was a good investment, and I told him the next day that I didn't want it, and he told me then he had sold it—or perhaps it was the day after the next—that part of it went to Mr. Whitney, and part of it to Mr. Eddy.

The Witness: That is the talk that Mr. Ames told me.

(Reading continued by Mr. Humphrey:) Now, I think it was on that trip, on my return over the Grand Trunk that I got on the car at Chicago, and I think Mr. Chesbrough was sitting in the car at the time, or else he came in a few minutes afterwards. The train left at eight o'clock, or a quarter after. We sat down and were visiting, and finally started talking about the business matters at home, and finally he asked me,—you wanted to buy some Old Second National Bank stock a while ago, and I told him I was desirous of buying some bank stock as guardian for the Ford children, and had talked to Mr. Ames about it, and he said,—you didn't buy it? And I said "No." And he said, "that stock was mine," and I said, "you were selling the stock," and he said "yes." And he told me that he did not own any of the stock then.

Mr. Clark: You have left something out.

Mr. Humphrey (continuing): And he told me that he did not own any of this stock then; and he said there was a thousand dollars that stood in his name, which belonged to Mr. Bump. That it had been assigned to him, so that he might act as one of the directors. I think we may have had some further talk about it."

Q. Did you give that testimony?

A. Yes, that is true.

Mr. Clark: I wish to read this one paragraph that Mr. Humphrey omitted. "And he said, you did not buy it, and I said no, and he said the stock was mine, and I said you were selling the stock, and he said I was selling the stock, but would not have let you have it, and I said why, and he said, well—there is going to be a large depreciation, or quite a loss on that before they got through, and he advised me against taking it."

I simply read that, because Mr. Humphrey had already read part.

133 Redirect examination.

By Mr. Clark:

The estate I spoke of, as turning money over to, was the Ford estate. I was acting as guardian for the Ford children.

Recross-examination.

By Mr. Humphrey:

This conversation took place in May, 1902; I can't remember the day or the date.

Q. In the testimony you gave on the 21st day of May, 1906, before Mr. McCormick, did you say: "Q. Mr. Fischer, when was it that you say you had this talk with Mr. Chesbrough? A. It was in May between the 19th and 21st, 1902. My expense book shows I left here on the 19th, and returned on the 21st, so that it must have been on the night of the 20th." Did you give that testimony?

A. I don't recall it, but I think it is true.

Redirect examination.

By Mr. Clark:

I had my expense book with me at that time.

JAMES M. LEWIS, sworn in behalf of plaintiff, testified as follows:

By Mr. Clark:

I live and have lived in Bay City for a good many years, and am in the fire insurance business. I entered the office of the Maltby Lumber Company in January, 1903; a few days after the first of the year. I entered there as an employee of the Old Second National Bank.

Q. To what extent was your connection with the bank kept secret, if at all?

Objected to as it is incompetent and leading. Exception for the defendants.

A. It was supposed to be a secret to everybody, except Mr. Maltby and his son. The other clerks were not supposed to know I was there for anything more than a hired clerk in the office. My duties were to look after the finances, open the mail, and take care of the bank account. Mr. Alvin Maltby was the apparent manager of the business. Alzina Maltby was not active. I don't remember whether Mr. Maltby was paid a salary or not. He gave his entire time to the business from January 1st, 1903, to the fall of 1904.

Q. When was the Maltby Cedar Company organized?

134 A. In July, 1904.

Mr. Frank P. Chesbrough acted on the first Board of Directors of the Maltby Cedar Company, together with Mr. Alvin Maltby, Mr. J. W. McGraw, and Mr. E. B. Foss, and Mr. James E. Davidson. Messrs. McGraw and Chesbrough remained as directors of this company for something like a year.

Objected to, because this should be shown by the directors of the Maltby Co. and they should be here; overruled; exception for the defendants.

They retired before our next annual report.

Q. Before the organization of the Maltby Cedar Company, who in behalf of the bank had to do with the Maltby matter in particular?

A. The board of directors. I got my instructions from them. Mr. Maltby received his instructions from the Board of Directors, but he had a free hand, except as to the expanding of the business, which was supposed to be closed out as fast as it could be. They possibly bought some small stock in order to close out stocks which they had on hand to fill them in. Mr. Maltby was not controlled in any way in respect to the marketing of the property, but I handled all the proceeds from the sale, depositing them in the bank, and taking care of any papers in the bank.

Q. Were there ever any cases, where your stock of personal

property poles or ties, became so broken that there were not enough to sell advantageously?

Objected to as leading; overruled; exception for the defendants.

Q. continued. What did you do in cases of that kind so long as the business was active?

A. Tried to replenish them, so as to sell the old. During that time, there was some new business.

Q. What was the object in view of the new business?

Objected to as incompetent and leading; overruled; exception for the defendants.

A. The object of closing out the business, to the best advantage.

The monthly statements of home discounts and accounts receivable were prepared under my supervision by one of the clerks. A copy was given to Mr. Maltby, and another copy to the bank. I don't recall any other written report I made to the bank, though I often had conversation and verbal reports, of which I have no record, with the officers of the bank. These were not always held in the same place. The office of Mr. Collins, the bank's attorney, was on the same floor of the same building as the Maltby office. Mr. John L. Stoddard succeeded Mr. Collins as the bank's attorney; he was, also, 135 Maltby's attorney, and his office was on the same floor in the Phoenix block. I often talked with Messrs. McGraw and Chesbrough, and often in Mr. Collins' office.

Q. Were these talks limited in any way, shape, or manner, or did they cover the general operation you were carrying on?

Objected to as leading; overruled; exception for the defendants.

A. They cover the general business of the company. I never had any experience in the cedar business before that, but Mr. Maltby gave me all the help and experience I needed. Mr. Maltby controlled his foremen and woodsmen in the woods. I never attempted myself to carry on the woods operations until Mr. Maltby left.

Q. After Maltby left, whose help did you have, if any?

A. We kept the same help, as long as we needed them. We kept the same Maltby Lumber Company office until the business was closed out to such a point that it wasn't necessary to have an office; then we took our books, and went into the office of Spear & Lewis.

Q. How fast did you push the sales of the Maltby Lumber Company property?

A. We pushed it as fast as we could to close out the business in the proper way. There are some matters yet that are not closed up.

Q. What have you now on hand, if anything?

A. Some land contracts. I acquired what knowledge I have of all branches of the business, through experience I had in the office with Mr. Maltby. I went to the camps once or twice.

Q. State to what extent, if any, your experience in this business, enabled you to judge the value of the property. Answer it if you can.

A. I think I was competent.

Objected to as incompetent; overruled; exception for the defendants.

I do not think I could have sold the assets to any better advantage by selling them more rapidly.

Mr. T. A. E. Weadock: Let me have an exception to this line of testimony.

The Court: You may have it.

Witness resumes: I do not think it would have been to any better advantage by selling it less rapidly. I do not know of any plan that

I could have followed to realize any more from the assets.

136 Q. What can you say as to whether the amount realized from the assets represented their full value to the bank in your opinion that is what you got out of them?

Mr. T. A. E. Weadock: Objected to as incompetent.

The Court: Overruled.

Mr. T. A. E. Weadock: Exception for the defendants.

A. They represented their full value to the bank.

Q. What can you say as to whether the net—I will ask you whether it meant their net value?

A. Their real value was represented by what I got out of it.

Q. State whether or not it was?

A. I think it was.

Q. State whether or not the net receipts were all applied on the old Maltby drafts?

A. No, not on all the old drafts. There was some new business going on all the time, and there was some payments.

Q. By net receipts, I mean net receipts after paying not only the current expenses, but current obligations?

A. They were all applied on the old debts.

Q. State a little more fully how fast the property was disposed of; that is what you succeeded in doing the first or the second year, and so on?

A. I couldn't say that. I don't recollect how long it was before I got the business down to a point where I closed the Maltby Cedar Company office.

I know to whom the various sales were made, and the money came through my hands, from the people to whom it was sold. The personal property was sold to different persons.

Q. What was done with the stock after it became so far depleted that orders could not be filled in the usual way?

Mr. T. A. E. Weadock: Objected to as incompetent and leading.

The Court: Overruled. Exception for the defendants.

A. It was in many cases sold out in lumps.

Q. Was there any better way that you know of to dispose of it?

Mr. Humphrey: Objected to as entirely immaterial and irrelevant.

The Court: Overruled.

Mr. Humphrey: Exception for the defendants.

A. Considering the stock as it was then, there was no better way I know of. I remember that there was such an inventory of
137 October 31st, 1902; that is, it was the Maltby inventory. I tried to find it, but I couldn't.

Q. Where did you look for it, Mr. Lewis?

Mr. T. A. E. Weadock: It was here at the last trial.

A. I looked in the Spear & Lewis office, and I, also, looked in the bank vault with Mr. Andrews. My impression was that when it was taken from the last trial, those papers were taken to the bank for safe keeping, because Spear & Lewis' vault was small, and I would not have any safe place, and I haven't seen them since.

Q. What was the method of making an inventory in the Maltby office? What came into the office from outside?

A. There was supposed to be an inventory of stock from the different yards to different yards sent in here by the foremen. Inventories came from a great many yards. I did not attempt to verify the 1902 inventory at all, nor did any one in the office, to my knowledge. The final inventory could be verified in the office only as to checking it from the records sent in by the foremen and checking prices. This would not disclose any errors except clerical errors, if any. Mr. Alvin Maltby was in control of the sales in 1903. As I was in control of the receipts—the moneys that came in, I could not reach any conclusion from the receipts as they came in in regard to the accuracy of the 1902 inventory.

Mr. T. A. E. Weadock: Objected to as incompetent.

The Court: Overruled. Exception for the defendants.

I do not know what property was sold and paid for after the date of the inventory of October 31st, 1902, and before I went into the office in 1903.

Q. If on October 31st, 1902, Mr. Maltby had poles and ties in his various yards, what was the condition of the market if you know, as to whether those could or could not be sold?

Objected to as incompetent. Overruled. Exception for the defendants.

(Question continued.) Whether they were quick assets or otherwise, if they were there?

A. I don't recall the state of the market at the time. I do not recall enough of this inventory to remember what I discovered, whether I discovered anything about it afterwards, as to its correctness in any way.

Q. Describe the manner in which the record of land was kept in the Maltby office?

138 A. They had a regular land book, and there was a clerk in the office which we always called the Land Clerk, who always handled all the land records.

Q. Did you afterwards learn anything about the condition of the titles of Maltby's lands?

Objected to as incompetent. Overruled. Exception for the defendants.

A. We afterwards discovered that a great many of the titles were very poor, in fact, nothing but tax titles. A great deal of the taxes had never been paid for many years. I don't remember about the timber rights. I know there were certain timber rights.

Q. Mr. Lewis, did you look at some of the lands yourself?

Objected to. Overruled. Exception for the defendants. (Page 389.)

A. Yes. I saw some of the lands at Morris Siding, and I saw a place called "Hard Luck" on the Saginaw Branch. Part of them were swamp lands, and part were not. The market for wild lands during the time I was in charge of the business, was not as good as it is now.

Q. What was the market for cedar swamp lands at that time, with the lumber off?

Objected to as incompetent. He did not buy or sell and doesn't know anything about it. Overruled. Exception for the defendants.

A. I can not say.

Q. State whether or not, you had difficulty in disposing of cedar swamp lands, without timber?

Objected to as immaterial. Overruled. Exception for the defendants.

A. I can not recall that there had been any particular difficulty in selling any more than that possibly; I thought when we made the sales. I understand that the directors of the bank had the land appraised.

Moved that this be stricken out. Overruled. Exception for the defendants.

I knew there was such an appraisal made.

A copy of the appraisal was given me by Mr. Maltby, and was evidently made by Mr. Carswell.

Q. How did the sales that were made compare in prices with prices at which these lands were appraised in the appraisal sheet.

Objected to as incompetent and immaterial. Overruled. Exception.

A. I can't say. I do not know of any place where the 1902 inventory would be likely to be, in which I have not looked for it. The account called "personal accounts" was a list of the accounts with the different jobs. Accounts with different parties who may have been buying stock for him.

Q. What had been done with the money mentioned in the personal accounts, and what did it represent?

Objected to as immaterial. Overruled. Exception for the defendants.

A. It represented money that had been put into the different jobs,

and also, money that he may have advanced for buying stock. I have had a good many years' experience keeping books, and since coming to Bay City, I kept books for John W. McGraw, Maltby, Brotherton & Company, and the First National Bank. I don't remember how much the personal accounts carried as an asset in the 1902 inventory, amounted to, but I think I have books which would show that.

Q. Had the item of personal accounts, which had been carried as an asset on Maltby's books, been charged off before the inventory of October 1902?

Objected to. Exception for the defendants.

A. No.

Q. Was the so-called series of accounts, carried in personal accounts, of any actual value as an asset at that time?

Objected to. Overruled. Exception for defendants.

A. I don't know.

Q. How much was actually realized out of these personal accounts?

Objected to. Overruled. Exception for the defendants.

A. I don't know.

Q. Had there been any separation between the good and bad accounts receivable, or had there been such separation at the time you went into the office?

Objected to. Overruled. Exception for the defendants.

A. At that time, there was no division of the accounts. I can't say positively as to whether they were good or bad at that time.

Q. It already appears that in the American Telegraph and Telephone Company account on the books, there was at one time a credit of \$25,000.00. What did that account mean?

Objected to. Overruled. Exception for the defendants.

A. I think they had stock in three of the yards that was not charged up to the account, actually belonging to American Telephone & Telegraph Co., and paid for.

Cross-examination.

By Mr. Humphrey:

I am in the insurance business, and have been in such business for ten or twelve years. When I was put in charge of this Maltby business by the bank, I was in the insurance business, at different times for six or seven years. Most of the time, I was in the fire insurance business; prior to my going into the insurance business, I was with the First National Bank, and previous to my connection with said bank, I was bookkeeper for Maltby, Brotherton, Grocery Store, and before being bookkeeper for said firm, I was working for John W. McGraw, bookkeeping in their general store, at the south end of the city, and prior to my last mentioned employment, I lived in Marquette, Michigan, and was a telegraph operator there. I got my lumbering experience in the Maltby

Lumber Company office, after I went into the Maltby Lumber Company office. I got my experience in the cedar business there. The only experience, and the only knowledge I had of the cedar business or the lumber business were what I was getting out of this office. I used to work on a railroad, and I should be a competent superintendent, I think. I did not consider myself perfectly competent to handle a lumber job at that time. I might have been competent to close out that business, but I would not be competent to continue running it. I continued to run it some time in the fall of 1904, until it was all closed out, and it took more than one year to close it. With competent help under me, I might have run it. Most any man could run it; it don't take much of a man to run a lumber business. I think I could handle it as well as the Maltby Lumber Company would do. I handled it from the office, in Bay City.

Q. You think then that a competent lumber man would handle his lumber business up in northern Michigan from an office in Bay City, do you?

A. Depended upon whether he was running an active business or closing it out. I was closing out the business. I continued to get some new business after Mr. Maltby left. I was going right on with the business and was closing it up; that is, I was going ahead with some of the jobs he started. I had offices in Bay City. I do not consider myself a competent lumberman. I just said I was competent to close out the business. A lumber business of several hundred thousand dollars requires pretty close attention. We attempted to close it out. My duty regarding the lumber business was to make the sales, and the business that was carried on in the woods, was carried on by the men left there by Mr. Maltby, and supposed to be competent men I thought. While Mr. Maltby was there in 1903, I was over him only as far as handling the finances were concerned. I had nothing to do with the lumbering. I did not give him directions. Mr. Maltby left some time in the fall of 1904, I don't recollect the date. The Maltby Cedar Company was organized in July, and he was there a few months after that. I don't

141 recollect how long. I have one report saying the Maltby Cedar Company was organized in July, 1904, but I have a record which shows June 29th. There was some reason for the other date. I don't recollect what it was. The stockholders of the Maltby Cedar Company were Mr. Alvin Maltby, James E. Davidson, E. B. Foss, F. P. Chesbrough, and Joseph W. McGraw. All of the stockholders of the Maltby Cedar Company, except Mr. Maltby, were directors in the Old Second National Bank. I don't remember any particular change in running the business when the Cedar Company was organized. Mr. Maltby stayed with the Maltby Cedar Company a couple of months after it was organized. I don't know if the Maltby Cedar Company was organized for the purpose of taking the entire business out of his hands. The directors of the Maltby Cedar Company were Mr. Alvin Maltby, J. W. McGraw, James E. Davidson, E. B. Foss and Frank P. Chesbrough. Mr. Maltby was the business manager, but the directors had their say. I last saw that Maltby inventory just after the last trial. Since then I never have

had it in The Maltby Cedar Company's office. The Maltby Cedar Company really have not an office. The business is being conducted, what there is of it, in Spear and Lewis' office.

Q. Where has the business of the Maltby Cedar Company been conducted for the past four years?

A. It was conducted—Well, after we left their regular office, in the Phoenix Block, it has been conducted in Spear and Lewis' office. I don't recollect just when we left that office, which was in the Phoenix Block, and in which no other business, except the Maltby's was conducted. Later when I could manage all the business, we moved the office; no change was made in the office force that I know of when the Maltby Cedar Company was formed. We began to curtail the office force in about a year. We stayed in this office until about 1909 which makes about five years, during which the Maltby Cedar Company's business was carried on at this place, and which time was spent in closing out the business. Mr. Maltby was in charge until the fall of 1904, and they had men working the timber land during this time; after Mr. Maltby left, I had charge, under the directions of the Board of Directors, and I remained in charge, cutting lumber and timber from the lands, and managing the business for a couple of years. We did not expand any, we attempted to get off timber where there were timber rights on the land and to realize on them. Each year's business was smaller than the preceeding year's. We were just simply closing out. The books would show how many poles and ties we obtained from the lands during that time. When we left the office in the Phoenix Block, we moved to my office; that is, to Spear & Lewis Insurance Office. When
142 we moved, the land book and personal ledger, customers' ledger, was taken over to our office, and all the land deeds, and records were put into the vault of the Old Second National Bank; all the rest was put into a vault, or store room in the Phoenix Block. A great many acres of land were transferred to the bank. I don't know just how many acres. I sold a great many of them, although some had very defective titles; by this I mean that some were nothing more than tax titles, and the statutory notices had not been given. Mr. Maltby should have given these notices, and although all the business was put into my hands, I did not find out about these matters. I took the titles as they were given me. A great many were gone over. When the matter of paying taxes on some lands came up, they were referred to the committee to see whether it was advisable to pay a lot of these back taxes. Occasionally we looked up the record. All this took place some time after the Maltby Cedar Company was organized, and at that time in 1905, Mr. McGraw was not a director of the Cedar Company.

Mr. Chesbrough never ceased to be a director of the Maltby Cedar Company. He is a director now. Mr. McGraw ceased to be a director in the Cedar Company between 1904 and 1905. He ceased to be a director of the bank before he ceased to be a director of the Maltby Cedar Company.

When we had occasion to sell lands, I looked up the titles, some of them were not even worth looking up. The taxes had not been

paid. We had Ogemaw and Iosco land examined by Mr. Charles Wood, of West Branch, after the Maltby Cedar Company took hold of them. I don't recall the date but know it was in 1902. It was some time after I was in the office, after Mr. Carswell's examination.

Q. Who were the three men that examined these lands?

A. I understand that before I went in there—I don't know what time it was—Mr. Carswell examined the lands for the bank and Mr. Wood examined them for the Maltby Cedar Company. Mr. Carswell was examining at the same time.

Q. What do you say that when you would find that a piece of land had a tax title, what would you do about it?

A. Some of it was let go, and the others that were not let go, we kept on the books and sold as fast as we could. What we considered good, we sold.

Q. You said there was a lot of imperfect tax titles. Detail when you found you had a tax title on a piece of land that was good, what did you do?

A. Why, we cleared the title if we could, by getting the proper deeds, from the original owner. In case we could not, of course, you understand, all of the lands were deeded to the Maltby Cedar Company, by Mr. Maltby.

143 Q. What would you do if you found a piece of land with a tax title on it? Now, in order to save it, and you had nothing but a tax title?

A. If the people wanted to buy it, we gave them a quit claim deed if they wanted to buy it. We sold it for the best price we could get. We did not think there was the money in it to give the statutory notice and perfect the title on it. We did investigate and found out what it cost. We never gave any notices.

Q. If you had given notices, the statutory notices, you would have got double the amount that Mr. Maltby had expended in taxes, together with \$5.00 on each description and all costs, wouldn't you?

A. We might if the parties redeemed them. Their failure to redeem would not give us a perfect title because they might have been sold for taxes again. After that, if we did not keep the taxes up, it would have been our fault. I didn't examine any lands. I was at Moore's Siding once. I have been over the lands at Hard Luck. I saw the camps on some of the lands. The reason I knew the amount of the lands was, because I had Mr. Maltby's head man with me. I do not know whose lands I was on there, as I went more to look at the stock, but looked at the land while there. I was more particularly looking at the stock; I did not care much about the lands. I merely looked at the lands, they were timber rights. I was looking for cedar ties or poles they had out, that had been cut. I don't know anything about what timber was still standing, as I did not examine the lands. I did not try to find out what the soil was. If I looked I would have known. A great deal of cedar lands are bad swamp. If cedar land were drained and taken care of, it would be good for agricultural purposes.

Q. Ordinarily in the cedar land as you say, good cedar land, it

has to have a good course of treatment before it is good for anything in your opinion?

A. I would say that some of it was. I would not say all of it was. I did not have the handling of the Maltby lands myself. Everything was submitted to the Board. I did not sell the lands without their instructions in selling these cedar lands we were not satisfied with anything we could get out of them but we got out of the land, anything that Mr. Wood estimated, we sold for more than his estimate. I examined the lands as much as any one might to see anything. I did not go there to examine the land, to put a value on them. I looked over very little of the land at Moore's Siding. I do not know whether I saw one forty acres all over. I went there to see the stock, but did not see what was going on. I did not look and see the lands for any purpose. The lands at Hard Luck did not belong to the Maltby Cedar Company. I did not go to look over the lands, 144 as I am not a land looker. I did not examine the lands at Hard Luck, nor did I inquire. Mr. Maltby had all timber lands at Hard Luck. I examined some of the Maltby lands at Hard Luck only to see what cedar grew on it. I did not go there to ascertain and determine how much cedar grew there. My experience in the insurance business has not taught me, nor have I learned, how to estimate timber. Part of these personal accounts were against individuals. Some of the personal accounts called for different jobs where he was lumbering. An account against the job, is not a personal account. He had men who were buying stock. He had some men who might have been buying, you might say, on a job basis, and those were about what his personal accounts were. These personal accounts would stand against those men until they either paid in the money or paid in their product. They were an indebtedness against him. When a job is charged with money, that is a representative account, and it hasn't anything to do with being a personal account at all. That is fictitious bookkeeping as to classification of accounts; that is like charging yourself with so much money, at your own job. In order to keep the accounts separate, one charges it on the job so as to keep it separate, that is all the purpose. That represents in each instance, the amount that you have put into each job on the debtors' side, and the credit side represents what comes out of the job when the books are kept right, and what has gone into that job is a proper account until it is closed out; until the job is closed up, it should be on the books. We have some of the assets yet; that is, a few lands in Iosco County and a few land contracts. We have some little shingle machinery stored in the Davidson yard, on the west side, still undisposed of, which Mr. Maltby turned over to us as security in 1902. I have not had recently shown to me, the testimony given by Mr. Maltby. I have had some of the testimony shown to me that Mr. Maltby gave when he was examined as a witness before a commissioner at Jackson, Mississippi. Mr. Clark read it to me just a few days ago; that is, last week some time. I was in Mr. Clark's office when he read it. I was not the manager when Mr. Maltby was the manager. When I went into the office in 1903, it was supposed to be kept secret,—when I went into the office in January, 1903. No

one was supposed to know why I went in there, except Mr. Maltby and the bank. Mr. Maltby wanted it shown that I was in there only as a clerk. That was a request of Mr. Maltby to me. I don't know who requested me to keep it secret. I should say it came through the officers of the bank. The Board of Directors said something about it. I don't recollect that any director ever asked me to keep it secret or that I was called into a Board meeting and was so requested,

145 but I understood from the officers of the bank that it was not to be known that I was put in there. I couldn't tell you what officer. I remember that I was taken into the directors' meeting and at the meeting—I cannot say whether any particular person stated it or whether it was understood why I went in there. I don't know who said it. I was at a meeting of the directors at the time I decided to go in there. I cannot say positively who was present and don't remember that any one personally told me to keep it secret. So far as I know it was not a regular meeting of the directors at that time. I don't recall that Mr. McGraw ever said anything of that kind to me. I know I had talks with Mr. McGraw about going into the bank but I don't think he ever told me anything about telling people that I was in there. I don't know whether Mr. Cresbrough told me anything of that kind. My own judgment would teach me to say nothing about it. I opened the mail of the Maltby Cedar Company, credited all the money that was received, and deposited it in the bank, and if there were any matters to be paid to the bank out of the money, I had the checks drawn and paid them; the money so received, came from people who owed the Maltby Lumber Company. I think some money came direct from the Second National Bank, but none of it came through Maltby. After Mr. Maltby had transferred all of his property to the bank, he was given a free hand; that is, he was not hampered in taking care of the business, so as to close it out; the only thing he was hampered in, was the extension or the enlargement of the business, which was supposed to be closed out as fast as possible. I think Mr. Maltby was paid a salary for his services, but not by the bank. At the time I first went in there, I don't think all the Maltby property had been conveyed to the bank, at the time I first went in there.

Q. Had he not then made assignments of all his property to the bank?

A. My recollection is that it was after that time. I do not know what papers he gave in the year 1902 to the bank.

Q. Did he give any securities to the bank at that time?

A. He was not in there I think. I don't know.

Q. He commenced in January, 1903? Is it from that time that you say Mr. Maltby had a free hand?

A. He had a free hand so far as I could see of it. I mean that Mr. Maltby ran the business just according to his idea of running the business, except as to expanding it. I can not say just how I knew he was running the business according to his idea. I knew, and that is all. I acquired that knowledge in some way. I don't recall how I acquired it. I don't recollect anything; I know he ran the business just as he pleased. So far as Mr. Maltby having a free

hand is concerned, I did not have absolute knowledge of that fact.

I think I have described in detail all that I did up to the time
 146 of the formation of the Maltby Cedar Company, except that
 the books were a trifle out of balance, and I went through them,
 attempting to get them in balance, and also, to examine the books
 as to the condition of the business, and whether everything was
 proper on the books. I was the office man. At that time I had nothing
 to do with the business outside of the office. Prior to the formation
 of the Maltby Cedar Company, I don't think I was ever at those
 different lumber yards. I was at the River Rouge Yard, but I don't
 think it was before the organization of the Maltby Cedar Company.
 I never checked up that yard, nor examined it. I have seen the inventory
 of October 31st, 1902. I never verified that inventory that
 I remember of. I did not find out that on October 31st, 1902, Mr.
 Maltby had a total of \$206,283.62 worth of cedar poles. I don't
 think I knew that in January, 1903. I did not know that Mr.
 Maltby at that time had cedar ties to the value of \$97,695.28. I
 never went over this property to verify his statement. I never attempted
 to verify this inventory of 1902; neither did I ever verify the inventory
 of 1903. I never looked over the property to see if it was there. I was
 examined in this case before as a witness, but I don't remember what I
 said then.

Mr. Humphrey: You are speaking now about land, I am speaking
 about the inventory. Did you find a single error in the inventory
 all the way through, either of the personal property or real property?

Mr. Clark: What are you reading from, if you are reading?

Mr. Humphrey: Page 464. Former record.

Q. "You are speaking now about the land. I am speaking about
 the inventory. Did you find a single error in the inventory all the
 way through, either of personal property or real property?"

A. I cannot recall we did."

"(The Witness:)" That did not refer to the 1902 inventory, as
 I understood it at that time.

Q. Have you understood this different recently than when you
 were examined before?

A. No, sir, I was very sure in answering that question. I referred
 to the 1903 inventory which I had something to do with, making it
 out after the inventories were returned to us from the different jobs
 and different foremen.

Q. Listen to this and see if your recollection is not correct: (reading)
 "The inventory was verified by me or somebody in behalf of
 the bank; soon after it was turned over by Mr. Maltby?"

A. That did not refer to the 1902 inventory.

147 Q. What inventory did it refer to?

A. Possibly that referred to the 1903 inventory. There
 were other inventories turned over by Mr. Maltby to the bank than
 the inventory of October 31, 1902. Mr. Maltby put the prices on.
 I did not make all of them. Besides the inventory of 1902, either
 Mr. Maltby or I turned over to the bank a couple of inventories
 of 1903, which inventories were made on the different jobs by the
 different foremen, and were sent to the office, where they were tabu-

lated; the prices put on by Mr. Maltby; the extensions made by somebody in the office and filed. They were checked and verified as near as could be. The land inventories were made up under the instructions of Mr. Maltby and the prices put on and extended and the whole inventory was footed up. The inventory was verified and it was copied from the different reports as they came in from the foremen of the different jobs. Of course as to their inventories being correct, I could not say.

Q. Then you didn't mean what you said?

A. I did mean what I said. I intended to say that there were no errors in the final getting up and checking of the record. I did not say that I verified those inventories on each particular job.

Q. (Reading:) "Did you find a single error in the inventory all the way through, either of personal property or real property?"

A. I cannot recall we did."

A. From the records as given to us, I cannot recall that we did.

Q. All you meant then when you said that the inventory was correct, was as to the records that were given to you?

A. I could not mean anything else.

Q. When you said in your other testimony the inventory was verified by me or by somebody in behalf of the bank, soon after it was turned over by Mr. Maltby, you meant then that that was an inventory made up by you, and turned over to you by somebody else, was verified by you?

A. The records of the inventories of the different jobs went through different hands before I got them. I understood they were correct; we simply then made an inventory from the figures we got from the different localities in the State.

Q. You intended that the jury to whom you gave this testimony before should understand that you had not verified the inventory at all?

A. Just what I said, that I had verified the inventory with what they were made up from these different figures. I don't know what I said, that is what I meant. I don't think any large jobs would make up the figures in any different way. They would have their

men make the inventory and send it to the office, and that
148 inventory would be tabulated, the prices put on and extended
and that is as far as any clerk in the office could verify it.

The bank knew that this inventory had been made from a copy of each job. Mr. Maltby left the Maltby Cedar Company job some time between the 29th of June and 31st of October, 1904. He went after the inventory was made. The inventory of October 31st, 1904, was made the same as before, in the usual form by the employees of the Maltby Cedar Company. The handwriting in Exhibit 148 is mine, and I think I gave a copy of that to the bank; at that time I was secretary and treasurer of the Maltby Cedar Company, and managed the business under the direction of the directors to whom I made reports of the condition of the business.

Q. Did you report to the Board of Directors on October 31, 1904, that you had on hand then belonging to the Maltby Cedar Company the amount of \$56,311.46?

A. I did, if that statement shows so. The statement shows what I reported to them under the personal accounts and the equipment, camp and office supplies and the amount of the bonds on hand.

Q. Did you report that you had in bonds \$5700.00?

A. I suppose so. Those were I think the bonds of the Angola Railway & Power Company.

Q. Did you report that you had ties \$17,983.19 worth?

A. If the statement shows that, I reported it.

Q. Did you report that the investment account showed a debit of \$15,665.07?

A. I think I did.

Q. Did you show that the accounts for poles had a debit of \$26,-866.55? Did you have those poles on hand?

A. I can only answer it "if the record shows that." I cannot recall the amount. I must make the same answer in regard to the other items.

Q. You reported to the board of directors that this is the stuff you had that date?

A. I suppose I did by turning that over to them.

Q. I will ask you to look at this paper and see if you showed that material to be of the value of \$303,801.23 on October 31, 1904?

A. Yes, that is as taken from the books as they stood. I know the inventory showed it and the books showed that there was so much in personal accounts. I don't say those were all good accounts."

Mr. John Weadock: Let me see the report, please.

Q. Now, I will call your attention to the stenographer's minutes with regard to the testimony of the Maltby inventory of October 31st, 1902, you being questioned in regard to this inventory, and these questions and answers were asked and given: "Q. The inventory was verified by you or by somebody in behalf of the bank soon

149 after it was turned over by Mr. Maltby? A. Yes, I think it was. Q. Did you find a single item in that inventory where you did not have the quantity and the property that he had described in his inventory? A. I think there were descriptions found where the titles were poor." What inventory did you refer to then? A. I didn't understand that I was referring to the 1902 inventory.

Q. What inventory did Mr. Maltby give except that one, in which he showed titles or showed lands?

A. An inventory each year,—the 31st of October of each year.

Q. Who gave an inventory to them, an inventory of October 31, 1902?

A. Mr. Maltby, he had charge of the business.

Q. Did you say that Mr. Maltby gave any inventory to the bank, including all the personal and real estate after this inventory of October 31, 1902?

A. He may have carried it down to them. It came out of the office and he knew of the inventory. I don't know anything about the 1902 inventory. The inventory of October, 1903, was the last

inventory Mr. Maltby had anything to do with the making up of. I never got any inventory from Mr. Maltby. He gave one to the bank in 1903. I have not seen that inventory that Mr. Maltby made since the last trial. I think it was made by typewriting. I think it was put in typewriting form. Mr. Maltby dictated it. I had no more to do with it than getting it up from the record he gave me. That included the same as the 1902 inventory. All the stock he had and all the land.

When I testified before, I certainly did not refer to the 1902 inventory, as I knew nothing about it. I never verified it. That inventory should have described the property under my control but I did not get it from that inventory. I didn't have anything to do with that part of the business when I went in there first. At that time I merely had charge of the finances. I had nothing to do with managing the business while Mr. Maltby was there. I handled all the moneys and the entire collection of the accounts receivable. I knew the amounts from the books. That inventory was not turned over to me by the bank. I saw it but I think it was by chance. I think it was there in the office. The very first move you make when you open a set of books would be to have the inventory, but I didn't open the books. The office force kept the books, the same as had been done before. The business was simply continued. It was not continued as being owned by the bank but as being owned by the Maltby Lumber Company.

Q. What was collected and turned into the bank between this 1902 inventory of Maltby's and the inventory of October 1, 1904?

A. Well I could not say that off hand. We were doing
150 business all that time, making new home drafts which were good and using them and paying them. It would be rather hard to say. The books would show the difference between the amount of home drafts at one date and the amount at the other. I cannot tell offhand for how much the poles were sold. They were sold at the market price. My impression is that the inventory of 1902 was made on the basis of the selling price of the stock and that the 1904 inventory was made on the actual cost price.

Q. Well if it was the selling price, why did you not get that?

A. Well, there were expenses for selling that stock. If the inventory is made on the selling price, they certainly cannot show a profit at the end of the year. Also the stock may not have been worth the selling price. That was the case in a great many cases when we came to close them out. That was true in every case where the yard was being cleaned up. Stocks had been held on hand for a good many years under Maltby's management and it became cull stock. We had to sell it for what it was worth. Also it may have been overestimated when it went in there. The prices were too high. Some of it went into culls. Some of it spoiled by being on the ground. While these poles may not have rotted, they did deteriorate. They cannot be called first class stock. In my opinion and experience, some cedar ties and posts will turn into culls by lying in the yards six or seven years.

Redirect examination.

By Mr. Clark:

Q. In regard to this difference between \$206,000.00, and \$26,866.65, do you know whether all the stock that was supposed to be there was actually there or not?

Objected to, as incompetent and leading telling his own witness what he wants him to testify to. Overruled. Exception for the defendants.

A. I think the total amount might have been there, but I know of cases where the stock was not there.

Q. Referring to this 1904 inventory, where you placed figures after certain items, state whether or not you refer to actual values or to entries on the books.

A. I was referring to entries on the books. I did not know what the actual values were only from records I had made there before. I got the figures from the books of the Company and other inventories.

Q. In one of Mr. Humphrey's questions he incorporated the assumption that you had reported to the bank that you had verified a certain inventory. State whether or not you did report to the bank that you had verified any particular inventory?

151 Objected to as incompetent; overruled; exception for the defendants.

A. I don't know as I reported anything of that kind to the bank.

Q. Referring to assets, the land which you have on hand, what is the value of those assets?

Objected to as incompetent; overruled; exception for the defendants.

A. The lands are worth probably One Thousand or Fifteen Hundred Dollars. I think Fifteen Hundred Dollars would be the outside value.

Recross-examination.

By Mr. Humphrey:

I never did report to the directors of the bank that I had verified the inventory of 1902.

W. O. CLIFT, a witness sworn in behalf of plaintiff, testified as follows:

Examined.

By Mr. John C. Weadock:

I have lived in Bay City for thirty-two years. I am in the real estate, insurance, loan, and brokerage business. I know the plaintiff, Woodworth, and the defendants, McGraw and Chesbrough. Early in 1903, on March 14th and May 25th, I had business with

Mr. Woodworth with reference to the Old Second National Bank stock.

Mr. Humphrey: I wish to take an exception to the use by the witness of that memorandum.

Witness resumes:

This memorandum was made by me a few days ago from records in my office. On March 14th I sold him twenty shares of Second National Bank stock for \$3,200.00, and returned the money to Mr. M. M. Andrews, cashier of the Old Second National Bank. I talked with Mr. Woodworth about this purchase some days prior to that day, and showed him at the time a statement of the Old Second National Bank, dated February 6th, 1903. I don't know whether he kept the statement or not. On May 25th, 1903. I sold him twenty-five shares of Old Second National Bank stock for \$3,960.00, and turned the money over to Mr. M. M. Andrews, cashier. On October 30th, 1903, I sold him twenty-five shares of Old Second National Bank stock for \$3,800.00, and paid the secretary of the Old Second National Bank; that is all the stock I sold him.

Q. To whom did you account for the money you received from Mr. Woodworth?

152 Objected to as immaterial; overruled; exception for the defendants.

Witness resumes:

During the year 1903, the defendant, J. W. McGraw, employed me to sell stock in the Old Second National Bank.

Objected to as immaterial; overruled; exception for the defendants.

The first time I sold stock was on April 8th, and I sold four shares of the Old Second National Bank stock, and the owners of same were, Mr. M. M. Andrews, two shares, and Julia W. Cook, two shares. He put that stock in my hands for sale about that date, or it might have been a day or two before. I sold the said stock to Mr. C. E. Malone.

Q. Do you remember having any conversation with Mr. McGraw at the time he put that stock for sale with you?

Mr. T. A. E. Weadock: Objected to as incompetent against Mr. Chesbrough.

The Court: It may stand as against Mr. McGraw.

A. In relation to what?

Q. In relation to the sale of the stock, or his selling of the stock or anything about it?

A. Not particularly. On April 14th, 1903, he placed with me for sale three shares of stock in the Old Second National Bank, and this stock belonged to Mrs. McGraw, Mr. McGraw's wife.

Q. When was the next stock he placed with you for sale?

Mr. T. A. E. Weadock: The same objection.

The Court: Overruled.

Exception for the defendants.

A. May 25th, 1903. That is the date I sold it. He placed it with me before that. That stock was sold for \$3,950.00. The stock I sold on this date belonged to Mr. Aaron Chesbrough, of Toledo, brother of Frank P. Chesbrough. I also, had twenty-eight more shares of the same man to sell, placed with me by Mr. McGraw. On October 30th, I sold twenty-five shares of Old Second National Bank stock, which Mr. McGraw placed with me for sale. This was Mr. McGraw's own stock. I did not know whose stock it was at the time Mr. McGraw placed his stock or his wife's stock or Mr. Cook's stock with me for sale. It was on one of the previous listings that he said to me that he listed the stock with me because it did not look well for a director of the bank to sell his own stock.

Mr. T. A. E. Weadock: Objected to as against Mr. Chesbrough.

153 When he listed the stock which was sold October 30th, the representation was made that it was stock that was owned by outsiders. I cannot tell you what the exact words of the conversation were but that is the impression that I was given and the inference I drew. That it belonged to a friend in Ithaca, New York, where he formerly lived.

In connection with my sales of stock to Mr. Woodworth, I went to him, he did not come to me.

Cross-examination.

By Mr. Humphrey:

I have been in the brokerage business since 1895. Since that time I have handled stock in Bay City to some extent, usually there is corporate stock of different concerns in Bay City on the market all the time. My business is acting between buyer and seller. In May 1903, I don't think I handled any other than Old Second National stock. In March 1903 I handled Valley Telephone stock. In March 1903, I sold seventy shares of Old Second National; on the same day I sold some telephone stock, and 20 shares of bank stock, both to Mr. Woodworth. The Valley Telephone stock belonged to J. W. McGraw. On April 8th I sold four shares of the bank stock, two of which belonged to Mr. Andrews, and two to Mrs. Julia Cook. On April 14th I sold three shares of bank stock which belonged to Mrs. McGraw and was listed with me by defendant, J. W. McGraw, and on April 22nd—five shares which belonged to A. J. Cook. On May 25th I sold twenty-five shares, and on May 27th, twenty-eight shares of the bank stock. During the whole month of April I sold only twelve shares in April. The next sale I made fifty-three shares of Aaron Chesbrough stock in May, listed with me by J. W. McGraw. It was at that time he said it didn't look well for a director to sell stock. I think I would feel the same way myself if I were a director. I was given to understand this stock was sent by Aaron Chesbrough to the Second National Bank to be held in the bank by the bank officials until it could be sold, and Mr. McGraw as a director came and listed the 53 shares with me. I can not say that Chesbrough listed it with Mr. McGraw for

sale. Up to that time I had sold three shares belonging to Mrs. McGraw. To my knowledge Aaron Chesbrough never lived in Bay City. I don't think it strange that he wanted to sell the stock. On June 16th I sold fifty shares of bank stock that Mr. Benjamin Godkin owned, and that he listed with me; he is a Bay City lumberman. Mr. McGraw or Mr. Chesbrough had nothing to do with this stock, and that is all the bank stock I sold in June, although
154 I may have sold other stock. On October 30th I sold stock, which after the sale I found belonged to J. W. McGraw.

Q. What did Mr. McGraw say to you about the sale of the stock in any way?

A. When he listed it with me?

Q. Yes?

A. You mean in relation to ownership?

Q. The stock was not given to you by him, was it?

A. No, sir.

Q. Did you know how the stock came to be there at the Second National Bank?

A. I supposed he placed it there himself.

Q. Who placed it there?

A. I don't know.

Q. You don't know how it came to be there?

A. I don't know who left it.

Q. At that time you knew that Mr. Woodworth had bought considerable of the stock of the bank?

A. Of course I knew that he had bought that which I had sold him. I went to Mr. Woodworth about this stock in the first place, because I regarded him as a retired lumberman, and thought he might have some money to invest. I don't think he told me at any previous time that he would like to buy some of the Old Second National stock. I knew Selwyn Eddy, and that he was a director of the Old Second National Bank for many years. He was a very competent business man. I don't remember the date he retired. I sold Charles A. Eddy some Old Second National stock. Mr. Charles A. Eddy was a partner in business with Mr. Selwyn Eddy, and they had been associated together for a great many years. I had the impression that Mr. Charles A. Eddy wished to acquire some of this bank stock.

Q. Didn't you understand that Charles A. Eddy and Mr. Woodworth were acting in concert to get interest in this bank?

A. No, sir.

Q. Didn't hear that?

A. No, sir.

Q. You had no knowledge of that?

A. No, sir. I learned that Charles A. Eddy wanted to get hold of stock in this bank through W. L. Clements. Mr. Clements and Mr. Eddy were directors in the First National Bank.

Q. Didn't you know that there was a movement in the First National Bank to get hold of stock of the Old Second National Bank for consolidation and that they were trying to pick up the

stock of the Old Second National Bank to consolidate the two banks together?

A. Yes, sir.

Q. Didn't you know that Mr. Woodworth was in that deal?

A. I did not.

Q. Did he say anything to you on that subject?

A. Never.

The stock that I sold to Charles A. Eddy was 28 shares of the Aaron Chesbrough stock. I don't think I told him what
155 stock it was he was buying. I knew he wanted to get hold of the stock and had no idea that it made any difference to him whose stock he got.

Q. Did you know that the scheme that was on foot was to get J. W. McGraw out of the bank as a director?

A. No.

Q. Didn't you hear that?

A. No.

Mr. Bousfield was also a director of the first National bank and also Mr. Clements. Mr. Whitney was not. I am not sure about Mr. Carrington.

Q. Which of these men told you that they wanted to get hold of that stock of the Old Second National Bank?

Mr. J. C. Weadock: Objected to as immaterial, irrelevant and incompetent.

What somebody told Mr. Clift in relation to the purchase of stock is not important in this case.

Mr. Humphrey: I will show to the court that this was a move to get hold of the stock to oust somebody out of the bank.

The Court: Sustained, unless you show that Mr. Woodworth was interested in this concerted action.

Mr. T. A. E. Weadock: We propose to show the concert of Mr. Woodworth with these same parties.

The Court: Sustained as not proper cross-examination. Not proper to the direct examination.

Mr. Humphrey: Note an exception.

Q. Did you not know that Mr. Woodworth tried to get the stock of Mr. Matthew Lamont of the Old Second National Bank?

A. No, sir.

Q. Didn't you know that when he couldn't buy it, he tried to get a proxy to vote it?

A. No, I did not.

Q. Mr. Clift, when you showed Mr. Woodworth that bank statement, how did you come to do that?

A. I had the statement in my pocket, for the purpose of showing it to any one whom I might be engaging with, for the sale of it. I presume he didn't ask me to show it to him. I suppose he read it over. I don't recall whether he said anything to me about the statement, it is so long ago. I did know Mr. Alvin Maltby at that time. At that time I was not connected with any other bank. In 1903, I was not connected with the Commercial Bank, as I went out of the

Commercial Bank, July first, 1895. I was connected with that bank for eight years. I was not connected with the Commercial Bank at the time of the Mosher and Maltby failure, as the failure occurred directly after I had resigned. I knew Alvin Maltby was doing his banking business in 1903 with the Old Second National Bank, but I did not tell Mr. Woodworth that at the time I was selling the stock to him. I don't think I said anything about it. I did not talk about it the day I sold him the stock, neither had I talked with him about it previous to that time. When Mr. Woodworth looked at the statement, he said that he was going to consider the purchase of it. I showed him the statement and gave him the price at so much for the stock. I think it was about three days after I showed him the statement, that I next saw him at his office; he did not send for me then, but I went there for the purpose of closing the deal for the stock. I was acting entirely upon my own initiative about going to him; nobody told me to go there or asked me to go there. When I went to see him the second time, he was in his office. He did not tell me what he had been doing in regard to investigating the stock since I talked with him before. I don't think he told me that he had been to the bank and got the cashier of the bank to give him a statement. When I saw him the second time, I could not pretend to say what the exact conversation was, but I sold him the stock—closed the deal so to speak, on the same terms that he had proposed before. The first time I sold him stock was on March 14th, and that was the stock which belonged to Mrs. Julia W. Cook. His office was in the Shearer Brothers' Building in the Shearer Block, and at this time, I think, Mr. Alvin Maltby's office was in the Phoenix Block, diagonally across from the Shearer Block. The stock that I sold him was in the hands of the Old Second National Bank, and that was the way it was handled in any transactions I had. That is not the way I usually handle stock. I have handled the stock of the Old Second National Bank in another way, also; that is, the fifty shares of stock of Benjamin Godkin was handled in another way, but that was long afterwards, but at that time I don't think I handled the stock of the Old Second National Bank in any other way.

Q. Is it not a usual and ordinary way to handle bank stock where there is a direct liability against the stockholders in that way?

A. Is it not the usual way?

Q. Was that the usual way of handling the stock where there is a standing liability against the stockholders to handle it in that way on the books of the bank?

A. I said I could not say. I handled some First National; very little Commercial, and that is all the bank stock I handled. I could not say exactly what years I handled the stock of the First National Bank, but I think back in 1901 or 1902. I do not think I handled any in 1903. I was not an employe of the First National Bank at that time, but I was an employe there from 1880 until 1887.

157 Mr. Charles A. Eddy was the president of the First National Bank in 1903.

Q. But the stockholders in both of these banks at some time while

you have been broker have handled stock through you in these banks?

A. In those two banks, yes, sir. The stock in those instances were transferred on the books of the bank and at the bank itself.

Q. Mr. Clift, to your knowledge didn't you know that Mr. Woodworth knew that Mr. Maltby did his business at the Second National Bank?

A. I knew that Mr. Woodworth knew that he kept his account there?

Q. Yes?

A. I should not say he did. I think he knew that. Mr. Maltby had done his business there at that bank for many years. He was supposed to be doing a large business at that time, in 1903, and doing his banking business at the Old Second National Bank. I have known Mr. Orrin Bump from about April, 1880, until he left Bay City, in 1902. Mr. Bump's reputation in Bay City was that he was considered a thoroughly, competent, high-classed banker, and a thoroughly honest man, and that is what I considered him also. I have known Mr. Andrews something like thirty-two years, and Mr. Andrews has always been known in this community as a thoroughly honest, and capable bank cashier, and I have always considered him as such. I know Mr. James Davidson, and I consider him a competent and capable business man, as well as a man of honesty and integrity, and this, also, applies to Mr. James E. Davidson whom I know.

The Court: I permitted this witness to use the memorandum in his hand showing the dates when he sold this stock, and the record shows that he made that statement from the books of the office, and if counsel desires to have them brought in, I will see that the witness does that.

Mr. T. A. E. Weadock: I don't question the matter at all.

158 Redirect examination.

By Mr. John C. Weadock:

Q. Mr. Clift, about each of these sales of bank stock about which you have intimated with regard to the selling of the Second National Bank stock, please state whether you had the certificates of the stock, the stock certificates. In each of the sales of the bank stocks, except the stock of the Old Second National Bank, please state whether or not you had the certificates of that stock on deposit at the time you offered them for sale?

A. I said in the case of the Commercial.

Q. As to the stock in the Old Second National Bank with the sale of which you had to do, did you have any of the certificates themselves of any of the stock that Mr. McGraw listed with you?

A. No, not that Mr. McGraw listed with me.

Q. Take the Godkin stock that was sold. State whether or not you had the certificates for that stock or the certificates?

A. I did.

Q. Not having the certificates themselves, what evidence of sale or

title, or papers did you give to Mr. Woodworth? How did he make arrangement for the delivery of the stock when he paid for it?

A. When the certificates were placed with Mr. Andrews, he gave his receipts to me for the number of shares that I was disposing of. I did not then know whose stock it was from the receipts. There was no way I could tell while I was selling this stock, whose stock it was. Not until he took his receipt to the bank, was there any way that Mr. Woodworth could tell whose stock it was, and he might not be able to even then.

Q. Now, Mr. Clift, is that the usual way of offering stock for sale? You simply list, to simply list the same, or is it done some other way usually, and if so, state what the other way is?

Mr. Humphrey: Objected to as entirely incompetent and leading.

Mr. John C. Weadock: I submit it is not a leading question. It is a question brought out by the counsel themselves.

The Court: I will admit it in view of the cross examination.

159 Mr. Humphrey: Exception for the defendants.

A. Not the way that I usually handle stock sales. Jennie McGraw Curtiss is a sister of J. W. McGraw, one of the defendants.

Recross-examination.

By Mr. Humphrey:

When I sold the Commercial bank stock, I had the certificates to sell. I could not say whether or not I did when I sold the First National Bank stock. The Commercial was not a National Bank.

Q. Don't you know that there is a difference in the stockholders' liability in a National Bank than in any other kind of a bank?

A. Why, I was of the impression that it was the same, but I may be mistaken. The Commercial Bank is a state bank.

Q. Are the stockholders of a state bank—do they have a double liability?

A. That is my impression, although I am not absolutely sure of that. I could not say that in the handling of the stock of a National Bank, it is usually handled, ordinarily handled the way this stock was handled. I knew that the bank had a first lien on all of the stock for the stockholders' liability by the bank, and whatever the account at the bank of the stockholder was, that the bank could hold that stock without transferring until that liability was settled. I said that I had no way of knowing whose stock I was selling. I did not take special pains, of course, to find out, and I did not try to at the time I was selling the stock. When Mr. Woodworth gave me the check, I gave him a receipt signed by Mr. M. M. Andrews, cashier of the bank. The stockholder that gave me that stock to sell, did not give me anything when he put it in my hands to sell.

Q. How did you get the receipt from Mr. Andrews?

A. He simply stated that he had so many shares to sell, and that he would place the stock with Mr. Andrews, and that Mr. Andrews would give me a receipt for it, which was done in each of the cases.

Q. You went to Mr. Andrews, and from him got a receipt that you had to sell?

A. Yes, sir.

Q. So you knew that you had for sale, so much stock of that bank, and the cashier's receipt that the stock would be issued to the purchaser?

A. Yes, sir, and that is what I sold to Mr. Woodworth. I did not ask Mr. Andrews whose stock it was. I did not care whose stock it was. I don't remember whether or not Mr. Woodworth asked me whose stock it was that he was buying.

160 Q. At any time did he ask you that when you offered him stock for sale?

A. Not that I recall.

Q. Now, at any time during 1903 from February 6th, and after that to October 31st, 1903, did you ever have any talk with Mr. Frank P. Chesbrough about this bank stock.

A. No, sir; neither do I remember of my having any talk with him regarding my selling it, or offering it for sale, or Mr. Woodworth buying the stock. I do not think he ever talked with me about it in any way. So far as I knew, I do not know that he had any knowledge that his brother who lives in Toledo, Aaron Chesbrough, had ever sold any stock.

Q. As I understand you, Mr. McGraw with whom it had been placed for sale, thought it was better to turn it over to you than for him to sell it himself, on account of his being a director?

A. Yes, sir, and I, having been connected with the bank, recognized that that would be so. I knew it would be better to have it sold through somebody else than through a director of the bank, and that it was proper for him to do it. I don't think Mr. Woodworth made any inquiry from me in any way in buying this stock, as to why this stock was being sold.

Redirect examination.

By Mr. John C. Weadock:

Q. Upon what do you base that statement as to the propriety of Mr. McGraw's action?

A. From the fact that if I were a director of the bank myself, and wanted to sell my own stock, I would not regard that it would be the proper thing. It might have some effect upon the bank if I were a director myself.

Q. Judging from your standpoint, I presume?

A. Yes, sir. If it were my own stock, and I were a director, there would be no impropriety whatever in selling my own stock, but the reflection that the public might have of it, might hurt the bank.

Recross-examination.

By Mr. Humphrey:

Q. Assuming that you were a stockholder in the bank, and that you were selling—you were a stockholder, and a director in the bank, and were selling one-half of your stock and retaining one-half

of it, would you consider that it would be proper and right to sell it through somebody else instead of selling it yourself?

A. Well, if under those circumstances, I think that the effect I might fear it might have on the bank, I would prefer to have someone else sell it rather than sell it myself.

161 Redirect examination.

By Mr. John C. Weadock:

Q. You spoke of Mr. McGraw being in the brokerage business in selling stock at the same time that you testified to selling Mr. Woodworth?

A. Yes, sir. Mr. McGraw was not in the brokerage business; he was in the lumbering business, and was, also, a director in the bank.

Q. Do you know of his being in any so-called brokerage business in Bay City at that time?

A. I do not know whether it was at that time or previously.

Q. What kind of brokerage business was it?

Mr. Humphrey: Objected to.

Recross-examination.

By Mr. Humphrey:

I don't remember whether it was right at that time in 1903 when he was in the brokerage business. I know how these statements were made out by the bank, such as I showed to Mr. Woodworth.

Q. You may state Mr. Clift as to how these statements are made up and verified by the directors?

Objected to and sustained as not being proper cross-examination. Exception for defendants.

Mr. Clark: I offer in evidence the stock account of defendant J. W. McGraw on page 82 of Exhibit 93. Exhibit 96 has been already offered in evidence being the stock ledger of the bank.

The page containing the account offered in evidence was marked Exhibit 149 and contained an entry showing that on October 30, 1903, defendant J. W. McGraw sold to Mary I. Hotchkiss 25 shares of stock of a par value of \$2500.00 and that he had left 25 shares of stock after making that sale.

Mr. Clark: We also offer in evidence the account of Mrs. Elizabeth McGraw on page 83 (marked Exhibit 150).

Objected to as incompetent and immaterial. Overruled. Exception for defendants.

The page so introduced contained an entry showing the sale by Elizabeth W. McGraw to C. E. Malone on April 15, 1903, of 3 shares of stock of the par value of \$300.00, leaving 3 shares still owned by Elizabeth McGraw.

162 By Mr. Clark: We offer in evidence the account of Mrs.

G. McGraw Curtiss on page 30 of the same exhibit (account marked Exhibit 151).

The account so introduced showed the sale of 30 shares of stock Frank T. Woodworth on September 17, 1903, that being all of the stock then owned by Mrs. Curtiss.

Mr. Clark: We offer in evidence the account of Frank P. Chesbrough on page 23 (marked Exhibit 152).

Objected to as incompetent and irrelevant, nearly a year before plaintiff bought stock and after that the Maltby account was secured. Overruled. Exception for the defendants.

The account so introduced showed that there was sold on May 6, 1902, 57 shares of Frank P. Chesbrough's stock to various persons, leaving ten shares still owned by Frank P. Chesbrough.

Mr. Clark: We offer in evidence the account of Aaron Chesbrough and on page 77. (Marked Exhibit 155.)

Objected to as incompetent and immaterial. No connection shown between the two. Overruled. Exception for defendants.

The account so introduced showed that Aaron Chesbrough owned May, 1903, 63 shares of stock of which 25 shares were sold on May 14th to Frank T. Woodworth and the remainder sold on May 26th and May 29th to other persons.

ALFRED W. CLARK sworn as a witness for the plaintiff, testified follows:

Direct examination.

By Mr. Clark:

I live in Cleveland, Ohio, and I am an accountant in the employ of The Bishop, Babcock & Becker Company. In 1909 I was an auditor, employed by Messrs. F. H. MacPherson & Company, Detroit, who are public accountants, making a business of accounting and investigating books, and as an employe of this firm, I investigated the books and records of the Old Second National Bank, in 1902, 1903 and 1904; that is, this refers to the dates of the entries that I investigated. I started the investigation on November 2nd, 1908, and continued up for three months. Mr. MacPherson instructed me regarding what to do. This firm of accountants were employed by Mr. Woodworth, and I knew I was doing the above mentioned work for Mr. Woodworth and his attorney.

I had some three years' previous experience as public accountant, working for Jenks Hardy, Toronto, Canada. I was with Mr. MacPherson for two years, and previous to this time I was banking in Toronto, Canada, with the Canadian Bank of Commerce, Traders' Bank, Sovereign Bank. In the Canadian Bank of Commerce, I acted as messenger and worked up as chief accountant.

Q. What does chief accountant correspond with in American banks?

A. The chief accountant is—I can hardly explain the connection with the American banks, for the simple reason that the chief accountant is the assistant to the manager, and the manager is the same as the cashier in American banks. It would really be the same as assistant cashier. I was accountant and manager in the branch

office of the Traders' Bank, and when I was with the Sovereign Bank of Canada, I was accountant and inspector. The inspector is the same as a bank examiner here. In 1908 and 1909 I examined the discount registers of the Old Second National Bank, as well as making an examination of the discount ticklers, the endorsement accounts, the transit account, and there may have been some books whose names I do not remember.

Q. I am referring now to the Maltby Lumber Company, in the bank, and it is not necessary for you to refer to any other account than that. What was the nature of your examination?

A. To find out the standing of the Maltby account with certain debts and liabilities. I did prepare the bill of particulars in this case.

Q. What can you say as to what the various paragraphs of the bill of particulars contained a complete list of the Maltby paper, held by the Old Second National Bank as shown by the books of the
164 bank?

A. They are a true copy of the books of the bank. I am no relation whatever of yours. I analyzed the items which went to make up the demand notes taken over by the bank from the Maltby Lumber Company of July 16th, 1903. I prepared charts giving an analysis of these items.

Mr. T. A. E. Weadock: I object to the charts as immaterial, incompetent and irrelevant.

Objection overruled. Exception for the defendants. Exhibit 154 marked.

Q. I show you Exhibit 154, old number 158, and ask you if this is one of the charts referred to?

A. That is one of them.

Q. What part of the Maltby paper does that chart include?

Mr. T. A. E. Weadock: What is this you are talking about? (Charts shown to Mr. Weadock.)

Q. Drafts drawn upon whom?

A. Drawn upon the Michigan Central Railroad Company.

Mr. T. A. E. Weadock: I object to that; it has not been offered in evidence.

The Court: Overruled.

Q. State whether or not that chart contains a correct statement of what it purports to show?

A. It does.

Mr. Clark: I offer it in evidence.

Mr. T. A. E. Weadock: Objected to as immaterial and incompetent; never brought to the attention of either of the defendants and it charges defendants with information contained in it. They are not chargeable with information disclosed by the books of the bank in this case, and the effect of this is that it has no bearing on the issues in this case.

The Court: In view of the voluminous records which have been

introduced, the court will admit it in evidence; the objection is overruled.

Mr. T. A. E. Weadock: The record is voluminous, but the point is that the directors are not chargeable by what is disclosed by the books of the bank.

Objection overruled. Exception for the defendants.

Mr. Humphrey: What is the number of the exhibit, Mr. Clark?

Mr. Clark: Exhibit 154.

Witness resumes: I have a recollection of the red box that is here in the trunk.

Q. Are the papers mentioned in this schedule, the papers in the red box, or some of them?

A. Yes, sir.

Mr. Clark: These might better be shown to the jury than read to them. Do you object to it being shown to them?

Mr. T. A. E. Weadock: I certainly do, when I object to the exhibit. (Exhibit 154 read by Mr. Clark.)

Q. I show you Exhibit 155, former Exhibit 159, is that a similar chart of the Chicago, Milwaukee and St. Paul draft?

A. Yes. The items in this chart are carried out in the same way as in the Michigan Central chart which you have just read. (Exhibit 155 marked.)

Mr. Clark: Offer it in evidence.

Mr. Humphrey: Incompetent and irrelevant for the reasons already stated.

The Court: It may be admitted.

Exception for the defendants.

Q. I show you Exhibit 156, former Exhibit 160, and ask you if this is a similar chart of the drafts on the Grand Trunk Railway System?

A. It is the same, and it is correct. (Exhibit 156 marked.)

Mr. Clark: We offer in evidence Exhibit 156.

The Court: Admit it subject to the same objection, and the same exception as previously. You may have the same exception and the same ruling in each one of these. (Exhibit 156 read in part by Mr. Clark.)

Q. I show you Exhibit 157, former Exhibit 161, and ask you if that is a similar chart of the drafts on the American Telegraph and Telephone Company?

A. Yes. It is correct. (Exhibit 157 marked.)

Mr. Clark: Offer in evidence Exhibit 157.

The Court: It may be received subject to the same objection and the same ruling. (Exhibit 157 read in part by Mr. Clark.)

Q. I show you Exhibit 158, former Exhibit 162, and ask you if

that is similar to the charts of the drafts drawn on the—is
166 the chart of the drafts drawn on the Western Union Telegraph Company?

A. Yes. My testimony is the same, as to the way it was made and its correctness.

Mr. T. A. Weadock: My objection goes to all of these.

The Court: The same objection, the same ruling, and the same exception. (Exhibit 158 marked.) (Read in part by Mr. Clark.)

Witness resumes: Exhibit 159, former Exhibit 163, is a similar chart of the drafts drawn on the Grand Rapids and Indiana Railway Company, and my testimony is the same in regard to the way it was made, and its correctness.

Mr. Clark: Offer in evidence Exhibit 159.

The Court: It may be received, subject to the same objection, the same ruling, and the same exception.

Witness resumes: Exhibit No. 160, former Exhibit 164, is a similar chart of the drafts drawn on the Saginaw Suburban Railway Company, and made in the same way, and my testimony is the same as to its correctness.

Mr. Clark: Offer in evidence 160.

The Court: Received, subject to the same objection, ruling, and exception.

Witness resumes: I do not attempt to go back of January 1, 1902, with any of these papers. I do not know whether any of them go back further than January 1, 1902.

Exhibit 161, former Exhibit 173, contains a list of the drafts on the Michigan Central Railroad; Chicago, Milwaukee and St. Paul; Grand Trunk Railway; American Telephone and Telegraph; Western Union Telegraph Co.; Grand Rapids and Indiana Railway and Saginaw Suburban Railway Co.; tabulated with reference to the dates of the five reports in January, 1903, to wit: February 6th, April 9th, September 9th, and November 17th. This schedule contains a correct list of the drafts against these various companies held in the bank on these various dates, as shown by the books of the bank.

Mr. Clark: We offer in evidence Exhibit 161, former Exhibit 173.

Mr. T. A. E. Weadock: That is objected to as incompetent,
167 irrelevant, and immaterial for the reason that the counsel in his statement shows that the paper in itself is incomplete; that it shows simply the date and amount of the different papers. It has no reference to the bills of lading, nor the inspection certificates, nor the assignments of the accounts to the bank and is a partial, one sided, self serving statement, and in so far as the figures are repeated, are incompetent as being already in evidence with the other papers if they are correct.

Objected to as above, overruled; exception for the defendants.

Exhibit No. 162, former Exhibit 172, is a classification of the contents of the red box, and this classification was made at the time of

the former trial in 1909. The red box referred to, is the box produced from the trunk, containing the papers fastened together with a rubber band. It took three or four days to make that classification, which is correct, according to the documents in the box.

Marked 162, and offered in evidence, in connection with the contents of the red box.

Objected to as being incomplete; overruled; exception.

Witness resumes: Included in this list are all the books and documents, including the documents in the red box, deposit, and discount slips, in the trunk; stock ledger of the bank; the stock certificate book; the domestic discount register; the foreign discount register; the domestic and foreign ticklers; the liability or discount ledgers; the loose leaf liability ledger; the day books showing bills discounted, credited daily, the transit account books; the suspended bills account book, the deposit ledgers and the general ledgers. These books are all the books necessary to make these computations.

Mr. Clark: We offer in evidence these books which have been already marked and which are now in court for the purpose of making these computations competent.

Exception for the defendant.

Plaintiff's Exhibits 154 to 161 inclusive, (being too long for insertion in the record), were in substance as follows:

EXHIBIT 154.

This was a chart of the Maltby Lumber Company drafts drawn upon the Michigan Central Railroad Company. It showed the date of discount, date of maturity, date of renewal, and date and amount of payments made on account of each draft, and showed that the dates of original discount of all the drafts shown on the chart 168 were prior to May 29, 1902, and that all of said drafts were combined on July 16, 1903, in a demand note of the Maltby Lumber Company for \$69,020.54 and that on August 2, 1904, the balance due on this demand note was incorporated in notes of the Maltby Cedar Company for \$251,770.98 and \$23,514.19.

EXHIBIT 155.

This was a chart of the Maltby Lumber Company drafts drawn upon the Chicago, Milwaukee & St. Paul Railway Company. It was in the same form as Exhibit 154 and showed that the dates of original discount of all the drafts shown on the chart were prior to December 24, 1902, and that all of said drafts were combined on July 16, 1903, in a demand note of the Maltby Lumber Company for \$17,093.93 and that on August 2, 1904, this demand note was incorporated in notes of the Maltby Cedar Company for \$251,770.98 and \$23,514.19.

EXHIBIT 156.

This was a chart of the Maltby Lumber Company drafts drawn upon the Grand Trunk Railway Company. It was in the same form as Exhibit 154 and showed that the dates of original discount of all the drafts shown on the chart were prior to August 25, 1902, and that all of said drafts were combined on July 16, 1903, in a demand note of the Maltby Lumber Co. for \$60,162.13 and that on August 2, 1904, this demand note was incorporated in notes of the Maltby Lumber Company for \$251,770.98 and \$23,514.19.

EXHIBIT 157.

This was a chart of the Maltby Lumber Company drafts drawn upon the American Telephone & Telegraph Company. It was in the same form as Exhibit 154 and showed that the dates of original discount of all the drafts shown on the chart were prior to October 27, 1902, and that all of said drafts were combined on July 16, 1903, in a demand note of the Maltby Lumber Company for \$61,082.45 and that on August 2, 1904, this demand note was incorporated in notes of the Maltby Cedar Company for \$251,770.98 and \$23,514.19.

EXHIBIT 158.

This was a chart of the Maltby Lumber Company drafts drawn upon the Western Union Telegraph Company. It was in the same form as Exhibit 154 and showed that the dates of original discount of all the drafts shown on the chart were prior to October 27, 1902, and that all of said drafts were combined on July 16, 1903, in a demand note of the Maltby Lumber Company for \$25,505.08 and that on August 2, 1904, this demand note was incorporated in notes of the Maltby Cedar Company for \$251,770.98 and \$23,514.19.

EXHIBIT 159.

This was a chart of the Maltby Lumber Company drafts drawn upon the Grand Rapids and Indiana Railway Company. It was in the same form as Exhibit 154 and showed that the dates of original discount of all the drafts shown on the chart were prior to September 19, 1902, and that all of said drafts were combined on July 16, 1903, in a demand note of the Maltby Lumber Company for \$31,026.11 and that on August 2, 1904, this demand note was incorporated in notes of the Maltby Cedar Company for \$251,770.98 and \$23,514.19.

EXHIBIT 160.

This was a chart of the Maltby Lumber Company drafts drawn upon the Saginaw Suburban Railway Company. It was in the same form as Exhibit 154 and showed that the dates of original discount of all the drafts shown on the chart were prior to July 14, 1902, and that all of said drafts were combined on July 16, 1903, in a demand note of the Maltby Lumber Company for \$1,838.70, and that on December 4, 1903, said note was paid.

170 PLAINTIFF'S EXHIBIT 161 (In Condensed Form) SCHEDULES 1, 2, 3, 4, AND 5.

Summary of Maltby Liabilities to Bank on Dates of Published Reports.

	Schedule 1. Feby. 6, 03. Drafts.	Schedule 2. Apr. 9, 03. Drafts.	Schedule 3. June 9, 1903. Drafts.	Schedule 4. Sept. 9, 03. Demand notes. M. L. Co.	Schedule 5. Nov. 17, 03. Demand notes. M. L. Co.
M. C. R. R. Co.....	\$69,930.82	69,905.02	69,609.11	69,020.54	64,491.34
C. M. & St. Paul.....	17,266.02	17,265.99	17,229.51	17,093.93	17,093.93
Gd. T. Ry.	60,564.88	60,564.88	60,364.88	53,162.13	53,162.13
Am. Tel. & Tel. Co.	65,031.51	64,666.67	64,584.51	58,398.01	58,398.01
W. U. Tel. Co.	24,878.52	25,902.57	25,759.66	25,505.08	25,505.08
G. R. & I.	32,236.97	31,875.39	31,515.66	31,026.11	30,685.44
Sag. Sub.	1,856.75	1,856.75	1,856.75	1,838.70	1,838.70
Unaccepted home drafts (renewals as per chart)	271,765.47	272,037.27	271,120.08	256,044.50	251,174.63
Sundry current discounts.....	67,932.51	72,206.77	52,431.03	67,506.61	77,296.06
Total	339,697.98	344,244.04	323,551.11	323,551.11	328,470.69

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PLAINTIFF'S EXHIBIT 162.

Classification of Collateral in Red Box.

	Am't of drafts attached to bills of lading dated between Jan. 1, 1902, and May 3, 1902.	Bills of lading dated between May 4, 1902, and Oct. 1, 1902.	Bills of lading dated between Oct. 2, 1902, and Jan. 1, 1903.
Amer. Tel. & Tel. Co.	\$10,654.80	\$38,322.65	None.
Chicago, Mil. & St. Paul		906.51	\$16,323.03

	Bills of lading dated between Jan. 1, 1902, and Apr. 1, 1902.	Bills of lading dated between Apr. 2, 1902, and Oct. 1, 1902.	Bills of lading dated between Oct. 2, 1902, and Jan. 1, 1903.
Grand Rapids & Ind.	\$3,741.23	\$25,419.47	None.
Grand Trunk Ry.	31,900.	24,200.	None.

	Bills of lading dated between Dec. 1, 1901, and Mar. 2, 1902.	Bills of lading dated between Mar. 2, 1902, and Oct. 31, 1902.	Bills of lading dated between Oct. 31, 1902, and Jan. 1, 1903.
Michigan Central R. R.		\$9,545.08	None.
Western Union	\$1,039.98	17,710.08	None.
Saginaw Sub.	1,856.75	None.	None.

	Bills of lading dated after Jan. 1, 1903.	Drafts with no bills of lading attached or accompanying.	Drafts with collateral of any kind dated after Jan. 1, 1903.
172 Amer. Tel. & Tel. Co.	None.	\$19,151.01	None.
Chic., Mil. & St. Paul	None.	None.	None.
Grand Rapids & Ind.	None.	2,734.54	None.
Grand Trunk Ry.	None.	5,129.80	None.
Mich. Cent. R. R.	None.	61,487.45	None.
Western Union	None.	7,152.51	None.
Saginaw Sub.	None.	None.	None.

Bills of lading to order of Old Second National Bank of Bay City, Mich.—None.

Amer. Tel. & Tel. Co., Cars consigned care of Maltby Lumber Co., yards, 190.

Cars otherwise consigned, 89.

I am not familiar with the banking methods in the United States. I don't know whether or not, there is a bill of lading in use everywhere called a straight bill of lading.

Cross-examination.

By T. A. E. Weadock:

I began the examination of the books and papers of the Old Second National Bank on November 2nd, 1908. It took three months

to complete the examination, working off and on. I came from MacPherson & Company in Detroit, and never before kept books in a National Bank in this country, and know nothing about such a system, nor the way the daily statements are made, nor about the statement the comptroller requested to be furnished from time to time by the bank, and the bank examiners. The system of book-keeping at the Old Second National Bank was not a new thing to me. It was just simply bookkeeping. The discount register, and the discount ticklers were the same as the ones I was accustomed to. I don't remember making an examination of the daily statement to verify it. Mr. Clark had employed Mr. McPhearson, and Mr. MacPherson brought me with him, and Mr. MacPherson told me what to do, and put it down on a piece of foolscap paper. My general instructions were to find out the liability of Maltby at certain dates, and also, the value of the Maltby Lumber Company account, of which I knew nothing, except what I found in the books, and outside of that information, I had no other. I am undertaking to give here what I made up from the books of the bank. I did not examine the books as to correctness, or take any trial balance. The dates I refer to were the dates of the reports; nothing was mentioned about bills of lading. I know nothing about the inspection of timber, nor

173 had I been employed in any bank in this country prior to 1909. I did not find anything wrong with the books. My instructions were to begin in 1902, and I carried these dates down to 1904, to show the outcome of the notes and draft. I have no date on any of these large sheets I prepared earlier than 1902. The bank gave me every facility to make this examination. They put all their books and information at my disposal. I took about three months to get the work, and two more to tabulate it; making five months in all; the tabulations were made, partly in Bay City, and partly in Detroit. These exhibits are printed in pen and ink, and I had helped from the office in Detroit, in making them out. Exhibit No. 162 is in my handwriting. The papers in the red box were handed to me in the court room here. I had seen them before in the Old Second National Bank. I don't know about their condition at any time except the times when I saw them. I do not know what become of the bills of lading and the drafts in 1902 except those that are pinned to papers in the box. At the head of this classification is the American Tel. and Tel. Company, and an item of \$10,654.80. The writing after that, refers to the same writing, and not to any item below. I could not tell from my examination in 1909 whether a particular inspection certificate belonged to one draft or another, except as it is pinned to the draft. I didn't compare the figures in the inspection certificate with the figures in the draft. The books will show whether a particular draft is paid or not. That is the only way, in which to find this out. If it were paid, and not entered on the books, I would know nothing about it.

Q. Now in 1902 you take a particular paper and then you carry it on to its due date and then add another paper to it?

A. That is a renewal of the paper. I knew it was a renewal because it accompanied the bill. That is the only way I knew it.

Q. You didn't know that it was a new paper that came in instead of a renewal?

A. I didn't know it.

Q. In some cases the amounts would be different?

A. In some cases they were.

The drafts I mention without bills of lading attached I do not know whether they had bills of lading attached before they came into the bank. I did not examine them to see if they had pin holes in them. I don't know whether or not it was the custom in that bank to pin the bills of lading to the inspection certificate, and the draft. I found some of the drafts that had inspection certificates pinned to bills of lading.

Q. Did you find assignments of these bills of lading to the bank? Pay in due course to the Second National Bank, Malthby Lumber Company?

A. Yes, sir, some like that. I did not put them on the 174 schedule here, because I was not told to by Mr. Clark.

Q. You were sent in there for a particular purpose governed by your instruction?

A. Yes, sir, and such instruction was received from Mr. McPherson, and the lawyer for the plaintiff. Those red ink figures on schedule 154 mean payments, and I knew they were payments by being marked on the drafts and also from the books of the bank. The following exhibits are not made out in my handwriting: viz: 155, 154, 156, 157, 158, 159, and 160. You have a number of exhibits that are prepared as my summary of the statement or of the examination I made in 1909 that are not in my writing at all. They are correct, however, as I verified them with some one. I checked the figures from my original memorandum, which I presume is in Mr. McPherson's office. I did not bring my memoranda up with me, because I did not think it was necessary.

Q. All of the dates of the reports which were given you in 1903. Why did you carry out your statement until 1904, and later?

A. To find the final results of the drafts. I presume Mr. McPherson told me to carry it out so far. Mr. McPherson did not superintend all of my work from time to time; he came here occasionally; about three or four times. At that time Mr. McPherson lived in Detroit, and most of the work was done in Bay City. He came to Bay City four or five times while I was working at the bank. The only things I have here are the statements some one else made, which I checked over. I have none of my original memoranda.

Redirect examination.

By Mr. Clark:

Q. Referring to exhibit No. 162, state how far down, under a column head, the figures come under that heading?

A. Until there is another heading.

Mr. Humphrey: We move to strike out exhibits No. 154 to and including 160, as not being the best evidence.

Motion overruled. Exception for defendants.

I don't recollect finding any loose bills of lading, without drafts attached that I have not referred to. All bills of lading and collateral are in my classification.

Q. Did you find any assignments of any kind on any paper which had been forwarded to the assignee or drawee?

Same objection.

A. I did not.

Q. Did you find any such assignment on any papers except the papers which are here in the red box?

A. I did not.

175 Recross-examination.

By T. A. E. Weadock:

There is no indication of the drafts being forwarded. The drafts themselves will show if they are forwarded by the endorsement on the back. If they were not endorsed, they would not have been forwarded. It is not the custom to present them in person. I consider that all drafts which were not endorsed were for that reason not forwarded. The drafts were dated in 1902 and 1903 and I made my examination in 1909.

Mr. Clark: We offer in evidence the daily statements of the dates when the dividends were voted and also of the dates when the dividends were payable. These dates are December 1, 1902, December 2, 1902, May 29, 1903, June 1, 1903, November 27, 1903, and December 1, 1903.

Objected to; incompetent, irrelevant and immaterial; overruled; exception for the defendants.

The material parts of the said exhibits were as follows:

PLAINTIFF'S EXHIBIT 163.

Daily Statement December 1, 1902.

Capital Stock	\$200,000.00
Surplus	75,000.00
Undivided profits	23,766.18

PLAINTIFF'S EXHIBIT 164.

Daily Statement December 2, 1902.

Capital Stock	\$200,000.00
Surplus	75,000.00
Undivided profits	23,766.18

PLAINTIFF'S EXHIBIT 165.

Daily Statement of May 29, 1903.

Capital Stock	\$200,000.00
Surplus	75,000.00
Undivided profits	38,948.87

PLAINTIFF'S EXHIBIT 166.

Daily Statement of June 1, 1903.

Capital Stock	\$200,000.00
Surplus	75,000.00
Undivided profits	28,948.87

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PLAINTIFF'S EXHIBIT 167.

Daily Statement of November 27, 1903.

Capital Stock	\$200,000.00
Surplus	75,000.00
Undivided profits	28,998.37

PLAINTIFF'S EXHIBIT 168.

Daily Statement of December 1, 1903.

Capital Stock	\$200,000.00
Surplus	75,000.00
Undivided profits	31,918.90

Thereupon the plaintiff rested his case.

FRANK T. WOODWORTH (recalled).

By Mr. T. A. E. Weadock:

Q. In 1903 you were Mayor of Bay City?

Mr. John C. Weadock: I want to make an objection as it is incompetent and improper at this time. It certainly was not overlooked. If it was overlooked, I have no objection.

The Court: Why did you not cross examine him at that time?

Mr. T. A. E. Weadock: It is more convenient to do it now. Does your Honor hold that I cannot cross-examine him?

The Court: There is nothing to bring it up.

Mr. John C. Weadock: I object to counsel's cross-examining the

witness. I told him that if he had omitted any cross-examination by inadvertence, I would permit it.

Mr. T. A. E. Weadock: It was not omitted by any inadvertence.

The Court: If you make him your witness I will permit you to ask that question.

T. A. E. Weadock: I will not make him our witness. I desire to cross examine under the State Statute.

The Court: Under the objection of counsel, you may cross examine this witness at this time relative to any matters that you overlooked or forgot when he was on the stand, but not relative to any matters intentionally omitted and not gone into by the plaintiff in their examination when he was on the stand before. As to those matters you may only examine him by making him your witness.

That statute to which you referred does not apply to this
177 court in this case. The objection is sustained.

Mr. T. A. E. Weadock: I move that the court direct a verdict in behalf of defendant Chesbrough.

Motion denied. Exception for the defendant.

Thereupon the counsel for both defendants moved the court to direct a verdict for both of them, submitting the same and the reasons therefor in writing in the words and figures following:

1. Because the plaintiff cannot maintain this action against two of seven directors.

2. Because the plaintiff cannot maintain this action at law. Chancery or equity alone being competent to deal with the various questions involved.

3. Because the bank, being new and at all times heretofore solvent, and no forfeiture of its charter ever having been adjudged, and this suit being brought by an individual stockholder, for his sole benefit for injuries which if they exist affect all the stockholders in proportion to their holdings, he cannot maintain the action.

4. For the reason that no knowledge on the part of these defendants or either of them such as to make them liable under section 5239 of the Revised Statutes of the United States, has been proved in this case.

5. Because if the plaintiff may recover, each person who held stock in the Old Second National Bank at the time that any of these matters arose may also maintain an action, thereby enabling each stockholder to bring action in his own name, and permitting as many suits as there are stockholders, against the defendants.

6. For the reason that the reports as published were in no instance, as shown by the proofs, the same as those sent to the controller of currency.

7. Because there is no evidence in this case that the defendants, or either of them, had any knowledge of the publication of any report set forth in the plaintiff's declaration.

8. For the reason that the plaintiff cannot recover under the declaration in this case.

9. For the reason that no conspiracy whatever, and no action as

between the two defendants, different from the action of the entire board of directors has been shown in any way in this case.

10. Because the declaration does not charge any violation of the National Banking Act except, "By signing, attesting and publishing and assenting to the publication of a false report of the resources and liabilities of the bank" without showing that the defendants or either of them, had any knowledge of the making up of said report, or knew that it was incorrect in any particular, which report is set forth in the declaration and sworn to by the cashier of the Old Second National Bank, whom the directors had a right to assume was honest and faithful before it was attested, if at all, by the defendants. And the testimony shows that the report was not incorrect in any particular. And because the statements and each of them show that each was sworn to by the cashier of the Old Second National Bank, whom the directors had the right to assume was honest and faithful before it was attested, if at all, by either of these defendants, and it does not allege that the defendants or either of them did anything maliciously or fraudulently. It does not allege, and there is no proof that either defendant, did anything maliciously or fraudulently.

11. Because as to the defendant Chesbrough, the fifth count is against McGraw alone, and is alleged to be based upon the report of June 9, 1903, which purports to have been signed by defendant McGraw, James E. Davidson and Edgar B. Foss, when such was not the fact.

12. I move your Honor to direct the jury to disregard the third count because said count is against defendant McGraw alone, and is alleged to be based upon the report of June 9, 1903, which purports to have been signed by defendant McGraw, James E. Davidson, and Edgar B. Foss.

13. For the reason that the declaration is framed against two of seven directors, and is not against the directors only who signed those four reports in question, nor against all the directors who attested any one of them.

14. Because the proof shows in this case that none of all the reports in question were ever prepared or published in accordance with the National Banking Act, the printed report being prepared by the cashier of the bank by means of a pencil copy, which was sent to the printer regardless of the names of those who actually signed the report which was sent to the printer, and it is not shown that the defendants or either of them had any knowledge of any one of the reports in question which was sent to the newspaper to be published, or had anything to do with its preparation in any form.

15. The jury should be instructed to disregard the sixth count for the reason that it is based upon the report of September 9, 1903, and the proofs show that it was not attested by defendant Chesbrough. It shows that it was attested by James Davidson, then president of the bank, not a party to this suit.

16. That the seventh count should be disregarded because it is based on the alleged report of November 17, 1903, which is claimed

to have been attested by the defendant Chesbrough and McGraw, and Edgar B. Foss, for the reason that it was not so attested, as shown by the proofs, and it does not state a cause of action against either of the defendants, and it is not shown that the report complained of was not exactly in form and fact as required by law, with the exception aforesaid.

17. The jury should be directed to disregard the sixth count, relating to the dividend of December 1, 1902, for the reason that it does not state a cause of action. The defendants, nor either of them is liable at law for an error in judgment, if any, no bad faith being charged or proved.

18. The jury should be instructed to disregard the seventh and eighth counts of the declaration, for the reason that knowledge of all the affairs of a bank are what its books and papers show, and cannot be imputed to a director for the purpose of charging him with liability.

19. And for the further reason, in regard to the dividend, that only a majority of the directors can declare a dividend, and that when declared, if illegally declared it may be recovered by the bank, and cannot be recovered by an individual stockholder, and for that very reason, that being an asset of the bank, the plaintiff cannot maintain an action in regard to it, and it must be recovered in an action by the bank.

20. Next, the ninth count of the declaration states no cause of action, for the reason that it states mere conclusions, and for the further reason that directors are not responsible for bad debts made by the cashier, or other officer of the bank, for they are not insurers of the paper held by the bank.

21. The tenth count should be disregarded by direction of the court, because it does not state a cause of action, and if it did state any it would be one that enured to the stockholders of the bank and not to the plaintiff.

22. For the reason that said declaration nowhere alleges that the bank has not been examined from time to time by the National Bank Examiners of the United States, who have made their findings to the comptroller of currency, who has decided all the questions raised by said reports—that is, the reports in question here—in favor of said bank, which decision under the law, covered the matters raised by the declaration.

23. Because the defendant Chesbrough as one director, nor both defendants as two of the seven directors of the said bank, could not charge off any of the paper of said bank as bad; nor could one of two directors declare dividends. And said declaration does not allege that the action of the defendant Chesbrough or the defendant McGraw prevented any paper being charged off, nor that at the time alleged in the declaration either of said directors or said board of seven directors of the said bank knew or believed that any of the paper should be charged off.

24. Because there is no evidence whatever of any conspiracy on the part of these defendants as claimed in the tenth count of the declaration.

25. For the further reason that the proof shows that the defendants nor either of them did not act negligently in signing reports, and because it nowhere appears, either in the declaration or in the evidence, that the board of directors of said bank did not employ honest and faithful agents, servants and employes, a competent and honest cashier, and honest bookkeepers. Nothing more is charged against them than attesting by their signatures certain reports prepared by those officers, agents and employes of said bank, without knowledge, participation or direction of the defendants or either of them, which several reports had been sworn to by the cashier of the said bank before its attestation by any director.

26. Further, because the defendants nor either of them is charged in said declaration with doing anything more than knowingly signing certain reports, and is not charged with preparing said reports, or with knowing them to be false in any particular.

27. For the reason that it is shown that the defendant Chesbrough was not present at the meetings of the directors which were held on April 4, 11, 18, and 25, 1902, nor at the meetings of May 2, May 16 and May 31, 1902. Neither was he present at the meeting held June 27, nor July 11, nor 18, nor 25, nor August 1, 8, 15, or 29; that he was not at the meeting held September 12 nor 19 nor 26; that he was not there on the 10th day of October, 1902, nor at the meetings held on the 24th or 31st of October, 1902; nor was he present at the meetings held November 7, 28, December 4, 12, 19, nor 26th. Neither was he present at the meetings held January 2, 9, 16, 23, nor 30th of January, 1903. Nor at the meetings held on February 6, 13, 20, 27, 1903; nor at the meetings of March 6, 13, nor 20, 1903; nor at the meetings of April 17, 1903, nor May 1, 1903, nor May 29, nor June 12, 26, nor July 3 nor July 10, 17, 24, 31, August 8, 14, 21, 28, nor at the meeting of October 2, 9, 16, and 23, 1903.

Mr. T. A. E. Weadock: I will add to the above that the plaintiff has not made out a case, and that the case proven is not the case alleged in the declaration, and there is a variance. The only thing plaintiff has in the declaration is formal action on the part of Mr.

Chesbrough in signing the specified reports.

181 Mr. T. A. E. Weadock: I move to strike out of the case, as evidence, the letter of December 16th, 1903, since defendants' liability, under the declaration, does not extend to their acts after November 17th, 1903.

Motion overruled; exception for the defendants.

Mr. T. A. E. Weadock: I move that defense be allowed to examine the plaintiff Woodworth, as a cross examination under the state statute, and without making him our witness.

Motioned denied; exception for the defendants.

MARTIN M. ANDREWS (recalled for defense).

By T. A. E. Weadock:

Mr. Woodworth was mayor of Bay City in 1903. I can not state positively whether any of those letters, received from parties with whom Maltby had been dealing, after the comptrol-

er's letter in 1902 was received, was brought to the attention of either McGraw or Chesbrough. I cannot state without referring to the meetings of the Board of Directors whether McGraw was at any meeting when those letters were submitted to the Board. Mr. McGraw was absent a long time; how long I do not know definitely. I don't think that either McGraw or Chesbrough ever asked to see the correspondence with reference to the Maltby matter. The reason why the drafts that Maltby made upon the parties with whom he was dealing were not forwarded for acceptance, was because they were certified, and an invoice attached assigned to the bank. In most cases the drawee consented to this arrangement, which was done by correspondence.

Mr. Clark: We move to strike out the statement as to what was done in so far as it was done by letter. The letters are the best evidence and we don't want the witness' statements to supersede the letters.

The Court: I understand that the counsel does not claim that they do that.

I think this was done by the direction of Mr. Bump who had the papers, but I don't know whether or not he advised with Mr. Collins, the lawyer, in regard to the form. This line was Mr. Bump's line and I only came into it afterwards. The minutes will show the exact date of the death of Mr. A. J. Cook, one of the directors. At present I can't find the paper marked No. 3 in the former case on page 241 of the record. Mr. Collins was not a director during 1902 and 1903, although he sometimes attended the meetings of the Board of Directors; often some of the Board met in his office. Mr. James E. Davidson succeeded Selwyn Eddy as a director, and A. M. Chesbrough succeeded A. J. Cook, on the 4th of September, 1903, and Mr. M. M. Andrews succeeded Orrin Bump on October 31st, 1903. At no time during the year 1902 and 1903, down to the 17th of November, did the directors ever attest and examine the different items of the report that was published, or make any further examination, than to sign the statement as being a correct transcript from the books.

Q. Now, Mr. Andrews, why was—what action if any was taken by the Board at any time prior to 1903, the 17th of November, in reference to charging off any papers of the Maltby Lumber Company?

A. I am not sure as to the date.

Q. The date is prior to November 1903, and as a matter of fact there was none charged off prior to that time of the Maltby Lumber Company paper?

Mr. Clark: It is conceded that the first was charged off in 1905.

A. No action taken as I recall previous to that date. Not that I know of did any one member of the Board of Directors at any time prior to November 17th, 1903, move to charge off any of the Maltby Lumber Company paper. None of the Maltby paper at any time prior to November 17th, 1903, was past due for six months, or over

past due; neither was there any of the Maltby paper prior to November 17th, 1903, upon which the interest had not been paid; nor was there any of that paper prior to that date which was in the course of collection, that is by suit.

Q. State, if you know why none of this paper was charged off prior to November 17th, 1903?

Mr. Clark: We object to that question, or any question, that goes to the reasons of other people which Mr. Andrews necessarily cannot know anything about.

The Court: This witness cannot say why it was not done. He was not a director all the time. I am permitting you to show everything that everyone did in connection with this action. This witness can not tell why somebody else did something else. I have permitted that on cross examination before.

Objection sustained.

Mr. T. A. E. Weadock: Exception for the defendants.

The cashier does not of his own motion charge off any paper. The directors are the ones who give the directions that papers should be charged off. I believe that during all of this time in 1902 and 1903, until the date I have mentioned, the Board of Directors consisted of seven persons. The Second National Bank was examined by the United States Bank examiners in the year 1902, twice at least; that is usual. It may be in some years more than that. They saw the Maltby paper that the bank held in 1902, and they, also, saw these drafts and bills of lading. Everything in the bank was placed at their disposal, and they took all the time they saw fit to make the examination.

Q. Was that known to the defendants, McGraw and Chesbrough that they had made these examinations that were made in 1902?

A. They were in the city at the time. They must have known that. The United States Bank Examiners made two examinations of this bank in the year 1903, but I am not sure whether or not such examinations were made prior to the 17th of November, but they made two examinations in that year. They saw all the papers in the red box; that is, all the papers of the bank, and made such examination as they saw fit, as well as taking such time as they saw fit. I did not prevent them from having all the time they wanted. Everything in the bank was placed at their disposal, books and everything else. For each examination the bank examiners made, they always had access to every department of the bank.

Q. Just tell the jury how these bank examiners do examine a bank?

A. The bank examiner always appeared early in the morning without giving previous notice of his coming. He first counted the cash before the office hours of the bank, before the bank opened, so that the teller could use his cash for the current day's business, and then he counted the bills discounted, proved them by the daily statement, and in that way went through the books of the bank, all of the accounts and assets of the bank, and found that they agreed with the daily statements. The daily statement is an assembly of

each day of business of the day, and shows the exact situation of the bank at the close of business each day. This examination usually took, the most, two days; a day and a half anyway. Defendants McGraw and Chesbrough would probably know, if they were in the city, of these examinations being made from time to time at the time they were made or just after the time they were made; however, to the best of my recollection, I don't know whether they did know.

Q. Now, you have the original reports there of the bank, the original reports to the Comptroller. These do not belong there. I want June, 1903, February down to June, 1904. I want the report of February, 1903, and June, 1903, and February and June, 1904?

A. Yes. I have not get them here, as those were not in evidence before. I can send for them now. I know the signatures of George B. Jennison, James E. Davidson, and F. T. Woodworth.

184 Exhibit 169.

Q. I show you Ex. 169, being the report to the Comptroller of May 29th, 1905, and ask you if that is the signature of F. T. Woodworth?

A. It is.

Mr. John C. Weadock: Is the same report in evidence when Mr. Woodworth was on the stand? That is just the original of that report?

Mr. T. A. E. Weadock: Yes.

EXHIBIT 19—Also 169.

Report of the Old Second National Bank, Bay City, Mich., May 29, 1905.

Certificates of deposit representing money borrowed. American Exchange Nat. Bank, New York.

Amount on demand.	Rate of interest.
5-16—20,000.00	3 per cent.
5-16—20,000.00	3 per cent.
Total.....	40,000.00

Balances Due from or to Approved Reserve Agents.

American Exch. Nat. Bk. New York.....	7,321.51
Far. & Mer. Nat. Bk., Philadelphia.....	10,270.56
First Nat. Bank, Chicago.....	2,921.33
Old Detroit Nat. Bk., Detroit.....	15,451.49
First Nat. Bk., Cleveland.....	12,722.87
Total	48,687.76
11—536	

Liabilities of Officers and Directors.

	Liability (indiv. or firm) as payers.	Liability (indiv. or firm) as endorsers or guarantors.	Shares of stock owned.	Over- drafts.
Jas. E. Davidson, President		5,000.00	None	12
F. T. Woodworth, V. P.	21,600.00	9,631.40	"	75
E. B. Foss, Director.	15,000.00	25,717.01	"	25
F. P. Chesbrough, Director	6,000.00	"	10
Geo. B. Jamison, Director. . .	9,184.02	8,072.09	"	10
Total.	51,784.02	48,420.50		

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Resources.

Loans and discounts on which officers and directors are liable.	100,204.52	
Loans and discounts on which officers and directors are not liable.	623,498.57	
		723,703.09
Overdrafts unsecured.		40.97
U. S. Bonds to secure circulation (par value)—2 per cent.		50,000.00
Stocks, security, etc., including premium on same		46,953.98
Banking house—None—Furniture and fixtures		2,500.00
Due from state and private banks and bankers, trust companies and savings banks		10,618.80
Due from approved reserve agents.		48,687.76
Checks and other cash items.		125.48
Exchanges for clearing house.		3,375.78
Bills of other national banks.		4,120.00
Fractional paper currency, nickels and cents		427.75
Lawful money reserve in bank.		
Gold coin	32,755.00	
Gold Treasury Certificates.	460.00	
Silver dollars	740.00	
Silver Treasury Certificates.	5,880.00	
Fractional silver coin	1,365.00	
Total specie	41,200.00	
Legal tender notes.	8,474.00	
		49,674.00
Redemption fund with U. S. Treasurer. .		2,500.00
		942,727.61

Liabilities.

Capital stock paid in.....	100,000.00
Surplus fund	40,000.00
Undivided profits, including amounts, if any, set aside for special purposes.....	29,265.10
Less current expenses and taxes paid.....	11,632.73
	<hr/> 17,632.37
Circulating notes secured by U. S. bonds.....	50,000.00
Due to National Banks (not approved reserve agents)	9,430.11
186	
Due to state and private banks and bankers.....	9,786.81
Individual deposits subject to check.....	247,897.03
Demand certificates of deposit.....	427,981.29
	<hr/> 675,878.32
Bills payable, including certificates of deposit represent- ing money borrowed	40,000.00
	<hr/>
Total	942,727.61
Loans and discounts (Including loans and discounts on which officers and directors are liable.)	
On demand paper, with one or more individual or firm names	10,644.71
On demand, secured by stocks, bonds and other personal securities	165,642.22
On time, paper with two or more individual or firm names	360,127.45
On time, single name paper (one person or firm) without other security.....	119,958.50
On time, secured by stocks, bonds and other personal securities	67,330.21
	<hr/> 723,703.09
Included in the above are other suspended and over-due paper amounting to.....	\$3,697.24
Overdrafts:	
Temporary	40.97
Stocks, securities etc. (Stocks, bonds, claims, judgments and similar items should be in- cluded under this head.)	
\$20,000.00 Bonds, Valley Telephone Co., original purchase. Amt. at which carried on books.....	18,000.00
Estimated actual market value.....	19,000.00
\$500 Bonds, Citizens' Telephone Co., debts previously contracted. Amt. at which car- ried on books.....	500.00
Estimated actual market value.....	500.00

827 Shares, Estey Mfg. Co., stock, debts previously contracted. Amt. at which car- ried on books.....	28,453.98
Estimated actual market value.....	56,907.96
Total amount at which carried on books.....	46,953.98
Total estimated actual value.....	76,407.96
Checks and cash items other than exchanges for C. H.	
Checks and drafts on banks etc. in this city, not members of clearing house.....	125.48

187 Average Reserve and Interest.

Average reserve for last thirty days (in bank and with reserve agents) on deposits and bank balances was	16½ per cent.
The highest rate of interest paid by the bank on de- posits is	3 per cent.
And on bills payable is	3 per cent.

I, M. M. Andrews, of "The Old Second National Bank of Bay City, Michigan," do solemnly swear that the above statement is true, and that the schedules on back of the report fully and correctly represent the true state of the several matters therein contained, to the best of my knowledge and belief.

Correct—attest.

(Signed)

M. M. ANDREWS, *Cashier*,
GEO. B. JENNISON,
JAMES E. DAVIDSON,
F. T. WOODWORTH,
Directors.

STATE OF MICHIGAN,
County of Bay:

Sworn to and subscribed before me this 3rd day of June, 1905.
(Signed) DAVID MILLER,

Notary Public.

(Exhibit 170.)

Q. I show you Exhibit 170, Mr. Andrews, being the duplicate of the report of the condition of the bank on January 11, 1905, sworn to on the 17th of January, 1905, and ask you whether that is the signature of the plaintiff, Frank T. Woodworth?

A. It is.

Mr. T. A. E. Weadock: I offer each of these statements in evidence.

Mr. Clark: No objection.

The Court: They may be received.

Mr. John C. Weadock: I would like to make the statement that these are the same statements that the witness, Woodworth, was ex-

amined about, that we used copies, copies being used at that time. I say that so that that explanation may go with the statements.

Mr. T. A. E. Weadock: I will read this. Have you a copy before you? (Reading.)

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EXHIBIT 170.

Report of the Old Second National Bank, Bay City, Mich., January 11, 1905.

Certificates of Deposit Representing Money Borrowed.

American Exchange Nat. Bank, New York:

Amount on demand.....	\$50,000.
Amount on time	None.
Rate of interest	Market rate.

Balances Due from or to Approved Reserve Agents.

American Exchange Nat. Bk. of N. Y.....	\$9,154.54
Far. & Mer. Nat. Bk., Philadelphia.....	9,854.24
First Nat. Bank, Chicago.....	11,854.86
Old Detroit Nat. Bk., Detroit.....	11,020.34
Euclid Park Nat. Bk., Cleveland.....	6,839.11
Total.....	48,723.09

Liabilities of Officers and Directors.

	Liability (indiv. or firm) as payers.	Liability (indiv. or firm) as endorsers or guarantors.	Over- drafts.	Shares of stock owned.
M. M. Andrews, Cashier..	.....	32.00	None	10
F. T. Woodworth, V. P.....	9,200.00	2,648.02	"	155
C. M. Bump, Ass't Cashier	.....	100.00	"	None
F. P. Chesbrough, Director..	6,000.00	.....	"	10
E. B. Foss, Director.....	35,000.00	45,283.97	"	50
Total.....	\$50,200.00	48,063.99		

Resources.

Loans and discounts on which officers and directors are liable as payers or endorsers	\$98,263.99
Loans and discounts on which officers and directors are not liable as payers or endorsers	801,559.15
	<u>\$899,821.14</u>

Overdrafts unsecured	29.60
U. S. Bonds to secure circulation, 2 per cent.	50,000.00
189 Stocks, securities, etc., including premium on same	46,953.98
Furniture and fixtures	2,500.00
Due from National Banks, (Not approved reserve agents)	3,933.89
Due from state and private banks and bankers trust companies and savings banks	10,281.29
Due from approved reserve agents....	48,723.09
Checks and other cash items.....	366.68
Exchanges for clearing house.....	3,049.21
Bills of other National Banks.....	3,632.00
Fractional paper currency, nickels and cents	121.22
Lawful money reserve in bank:	
Gold Coin	\$31,630.00
“ certificates	640.00
“ “ Payable to order.....	None
“ clearing house certificates.....	None
Silver Dollars	4,295.00
“ Certificates	10,220.00
Fractional silver coin.....	850.00
Total coin and certfs.....	47,635.00
Legal tender notes	17,051.00
	64,686.00
Redemption fund with U. S. Treasurer (Not more than five per cent on circulation)	2,500.00
Total	\$1,136,596.08

Liabilities.

Capital stock paid in.....	200,000.00
Surplus fund	75,000.00
Undivided profits, including amounts, if any, set aside for special purposes.	21,050.01
Less current expenses and taxes paid..	5,147.23
	15,902.68
Circulating notes secured by U. S. bonds	50,000.00
Due to national banks (Not approved reserve agents)	25,780.90
Due to state and private banks and bankers	49,993.65

Individual deposits, subject to check..	209,236.96	
Demand certificates of deposit	460,681.89	
		669,918.85
Bills payable, including certificates of deposit representing money borrowed		50,000.00
Total		\$1,136,596.08
190 Loans and discounts. (Including loans and dis- counts on which officers and directors are liable.)		
On demand, paper with one or more individual or firm names		\$10,344.71
On demand, secured by stocks, bonds and other per- sonal securities		292,705.67
On time, paper with two or more individual or firm names		419,793.76
On time, single name paper (one person or firm) without other security		104,500.00
On time, secured by stocks, bonds and other personal securities		72,477.00
Total .		\$899,821.14
Bad debts, as defined in Section 5204, Revised Statutes		None
Other suspended and over due paper		15,196.63
Over-drafts.		
Temporary		29.60
Stocks, securities, etc.		
\$20,000 Bonds, Valley Telephone Co. Original pur- chase.		
Amt. at which carried on books.....		18,000.00
Estimated actual market value.....		19,000.00
827 shares Estey Mfg. Co. stock. Purchased to se- cure debts previously contracted		
Amt. at which carried on books.....		28,453.98
Estimated actual market value.....		56,907.96
I Mtg. Bond, Citizens Telephone Co., to secure debts contracted. Jackson, Mich.		
Amt. at which carried on books.....		500.00
Estimated actual market value.....		500.00
Total amount at which carried on books.....		46,953.98
Total estimated actual market value.....		76,407.96
Checks and cash items other than exchanges for C. H. Checks and drafts on banks etc. in this city not members of clearing house		366.68
Average reserve and interest.		
Average reserve for last 30 days (in bank and with reserve agents) on deposits and bank balances was..	16.14 per cent.	

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The highest rate of interest paid by the bank on
deposits is 2½ per cent.
And on bills payable is Market rate.

I, M. M. Andrews, Cashier of the Old Second National Bank of Bay City, Michigan, do solemnly swear that the above statement is true, and that the schedules on back of the report, fully and correctly represent the true state of the several matters therein contained, to the best of my knowledge and belief.

Correct attest:

(Signed)

M. M. ANDREWS, *Cashier*.

JAMES E. DAVIDSON,

GEO. B. JAMISON,

FRANK E. WOODWORTH,

Directors.

STATE OF MICHIGAN,

County of Bay:

Sworn to and subscribed before me this 17th day of January, 1905.
(Signed) DAVID MILLER,

Notary Public.

Witness resumes:

The report of the condition of the Old Second National Bank at the close of business on the 11th day of January, 1905, is a duplicate of the copy sent to the Comptroller, and by him preserved in Washington. There is a copy in the bank, and one sent to the Comptroller of the Currency, and it has been there since the report was there. This report is attested to by me as cashier of the bank, and the following is what I said in the report:

"I, M. M. Andrews, cashier of the Old Second National Bank, of Bay City, Michigan, do solemnly swear that the above statement is true, and that the schedules on the back of the report, fully and correctly represent the true state of the several matters therein contained, to the best of my knowledge and belief. Signed M. M. Andrews, Cashier."

It was sworn to on the 17th day of January, 1905, and at that time I did believe that statement to be true. It was sworn to by me before it was signed by the directors, James E. Davidson, George B. Jennison and Frank T. Woodworth.

Q. The loans and discounts amount to \$889,821.14; Overdrafts unsecured \$29.60; United States Bonds to secure circulation 2%, \$50,000.00; Stocks, securities, etc., including premium on same, \$46,953.98; furniture and fixtures \$2,500.00; due from National Banks \$3,933.89, due from State and private banks and bankers, trust companies and saving banks \$10,281.29; due from approved reserve agents \$48,723.09; checks and other cash items, \$366.68; Exchanges for Clearing House \$3,049.21; Bills of other National Banks \$3,632.00. These bills of other National banks means money, National Bank currency, does it?

A. Yes.

Q. Fractional paper currency, nickels and cents, \$121.22; gold coin \$31,630.00; gold certificates \$640.00; silver dollars \$4,295.00; silver certificates \$10,220.00; fractional silver coin \$850.00; total coin certificates \$47,635.00; legal tender notes \$17,051.00; total \$64,686.00; redemption fund with United States Treasurer, \$2,500.00; total \$1,136,596.08; and on the other side of the report capital stock \$200,000.00; surplus \$75,000.00; undivided profits \$21,050.01; less current expenses and taxes paid \$5,147.33; net \$15,902.68; circulation notes secured by U. S. bonds \$50,000.00; due to National Banks \$25,780.90; due to State and private Banks and bankers \$49,993.65; individual deposits subject to check \$209,236.96; demand certificates of deposit \$460,681.89; total \$669,918.85; due to the other banks bills payable, including certificates of deposit representing money borrowed, \$50,000.00 making a total of \$1,136,596.08; the amounts on the other side. Now on the back of this report were listed the stock securities and bonds, Valley Telephone Company \$18,000.00; 827 shares Estey Manufacturing Company—these are the stock securities and claims, total, amount at which carried on books \$46,953.98?

A. Yes.

Q. Now, among the liabilities of the officers and directors, I find F. T. Woodworth, Vice President, individual or firm liability \$9,200.00; liability individual or firm, as endorser or guarantors \$2,648.02? State what examination of the affairs of the bank Mr. Woodworth had made, Mr. Andrews, before he signed that report?

A. None whatever that I know of. He signed the report at the request of the Comptroller of the Currency. I called his attention to it. The request was made by me. The Comptroller of the Currency requests the signature of three directors to attest it. Never to my knowledge, at any time in my banking experience, when any director was called upon to attest a report to the Comptroller of the Currency did he go through the bank and examine all of these different items to see whether or not they were correctly stated by the bank. The Old Second National Bank has never ceased doing business.

Q. State whether or not the tendency of this litigation which has been pending in one form or another since 1905, has affected in any way the value of Old Second National stock?

193 Mr. Clark: We object to that. It is absolutely immaterial. It can make no difference whether it affected the stock. We are not claiming anything for that reason.

The Court: Objection sustained. Exception for defendants.

So far as I know, the statements to the comptroller, and the reports for publication, are prepared in the same way by the Second National Bank, as in every other national bank. The value of stock in the bank which is a going concern, is less than the book value of the stock, for an allowance is always made for bad debts.

Q. Did you or Mr. Woodworth ever have anything to say in reference to the possible effect upon the Old Second National, of this litigation?

Mr. Clark: We object to that because it makes no difference. We claim nothing for any depreciation of the stock due to any other cause

than the one mentioned in the declaration. The amount for which plaintiff sold his stock was referred to in the opening statement but counsel took exception and for that reason we did not put it in evidence.

The Court: Objection sustained. Exception for defendants.
(Witness resumes.)

I think that the United States Bank Examiners objected to and criticised the Maltby paper prior to November 17, 1903.

Q. Let me call your attention to the testimony before on that subject.

Objected to.

The Court: I excluded that on plaintiff's direct examination. I did not permit plaintiff's attorney on direct examination to read to the witness from his testimony.

Objection sustained; exception for the defendants.
(Witness resumes.)

I don't remember the date the Maltby account began; it was about December 7th, 1895, and continued until the end of the Maltby business. I don't know whether or not he had an account in any other bank, although there was a clearing house at Bay City. After July 1st, 1900, the Maltby business in the bank amounted to five or six hundred thousand dollars during a year. I think both Mr. J. W. McGraw and Mr. F. P. Chesbrough kept their accounts in the Old

Second National Bank during all this time. Regarding about 194 how much Mr. Chesbrough's account would average during the years 1902 and 1903, I could only tell by referring to the books; however, my best recollection as to the amount, is several thousand dollars at least. I don't know whether Mr. McGraw kept an account in any other bank during that time or not. During those two years, up to December 1903, Mr. McGraw's account always had a substantial balance.

Q. Do you remember the fact of Mr. Chesbrough applying for a loan at the Old Second National Bank at the time he was building a vessel, he and his partner and brother F. B. Chesbrough?

A. I don't recall it.

Q. Was any application made to you?

A. I don't recall it. I don't know of any application made to Mr. Bump for a loan of \$50,000.00.

In 1902 and 1903 prior to the 17th of November, I believe William L. Clements was a director of the First National Bank of Bay City, also Mr. A. E. Bousfield, as well as Mr. Charles A. Eddy, who is now President of the First National Bank, and I believe was then. I don't know anything about what the plans were of Mr. Charles A. Eddy, Mr. William L. Clements, Mr. A. E. Bousfield, and Mr. Frank T. Woodworth, also Mr. John L. Stoddard prior to the 17th of November, 1903, regarding a change in management of the Old Second National Bank by the election of a new Board of Directors. I don't know anything about a meeting these gentlemen held at the Ridotto in Bay City; I just heard about it; that is all. January 10th, 1905, Mr. McGraw was defeated for election to the Board. The fol-

lowing were elected at that meeting: James E. Davidson, Frank P. Chesbrough, George B. Jennison, Frank T. Woodworth, Edgar B. Foss, John L. Stoddard, and Mr. M. M. Andrews. Mr. George B. Jennison, and Mr. Stoddard were, both, new men on the Board, as was, also, Mr. Woodworth at that time. Mr. James E. Davidson succeeded his father as president. To the report to the Comptroller of the bank on the 11th day of January, 1905, among the loans and discounts of \$899,821.14, the Maltby Lumber Company was included.

Q. State whether or not on the 29th day of May, 1905, the date of the report to the comptroller, the loans and discounts of the Old Second National Bank, namely—\$723,703.09, included all the Maltby paper the bank held at that time?

A. No, some of it was charged off in February, 1905.

Q. With the exception of what had been charged off in February, it included all of the paper?

A. All that the bank held. Prior to the signing of his name to this report on the 29th day of May, 1905, Mr. Frank T. Woodworth did not make any examination of the affairs of the bank with reference to signing the report.

195 Cross-examination.

By Mr. Clark:

Q. The amount that was charged off in February, 1905, was \$135,000.00—was it not?

Objected to as incompetent evidence in this case; overruled; exception for the defendants.

A. It was. With reference to the meeting I heard about which took place in the Ridotto, I am not certain as to the date, but I think it was a very short time before the change was actually made in the Board, and the change was made in the Board in January, 1905. I understood that the meeting at the Ridotto was merely a meeting of the stockholders of the bank to talk over the situation of the bank, and decide on what ought to be done for the good of the bank,—and I didn't hear that there was any effort there toward the removal of Mr. McGraw from the Board.

Q. Was it not true that Mr. McGraw had only a small amount of stock left, and that the other stockholders that came in like Mr. Woodworth had much larger amounts?

A. They had larger amounts than Mr. McGraw. Part of the talk regarding the change in the Board was based upon the fact that the large stockholders ought to have a larger representation on the Board. I never heard anything to indicate that Mr. Woodworth was attacking Mr. McGraw personally,—that is to get him off the board. None of this talk that I heard was earlier than a short time before that meeting in January, 1905.

Q. Taking up the invoices that counsel speaks of, which you say contained assignments or endorsements of some kind, what you are talking about are the papers that were in the bank, are you not, Mr. Andrews?

A. Yes, sir. Those papers were brought to the bank by Mr. Maltby, and left in the bank, and never went out of the bank. The invoices that went to the drawees were sent from Maltby's office, not from the bank.

Q. You don't know now whether such invoices he put on such endorsements or assignments?

A. Only as he told me. If he told me so, and did not do so, I had no way, personally, of checking that up.

Q. There was nothing within your knowledge to show that these companies ever received any such endorsement or assignment from Mr. Maltby, was there?

A. Personally, I don't know. On January 17th, 1902, Mr. Selwyn Eddy and Mr. James E. Davidson were both apparently elected directors. On that date there were eight directors elected. Mr. Eddy was not re-elected in 1903. Mr. Eddy's name is not recorded as having been present at any meeting after January 17th, 1902. I do not know why Mr. Eddy dropped out. We did not elect a member on the Board to take his place. It was not thought advisable until the end of the year, and the next year, instead of electing a substitute for Mr. Eddy, we merely reduced our Board from eight to seven directors.

Q. You stated that none of the directors made any effort to charge off any paper up to November 17th, 1903, I want to carry that down to December, 1903, was that true?

Mr. T. A. E. Weadock: Objected to anything after November 17th, 1903.

Objection overruled; exception for the defendants.

A. I don't recall that any effort was made or any discussion in the matter. Not to my knowledge was the effort made by Mr. McGraw or Mr. Chesbrough any more than by anybody else. The bank examiner merely examined the books and money, and discounts in the bank; that was his business. He did not examine the letter files of the bank, nor did he examine what personal memoranda I had; neither did he go and personally examine the Maltby Company office.

Redirect examination.

By Mr. Humphrey:

Q. State whether or not in 1903, you heard talk among the directors of the bank that the Maltby Company loan was perfectly secured?

Mr. Clark: Objected to as hearsay.

The Court: Objection sustained.

Mr. Humphrey: Exception for the defendants.

Q. Mr. Andrews, after the deeds and bills of sale were given by Maltby to the Old Second National Bank or to James Davidson as trustee of the bank, transferring all his property, you may state whether or not you heard it discussed among the directors that they

considered the loan of Maltby perfectly secure and the security good, and worth every dollar of it?

Same objection as above; exception for the defendants.

Witness resumes: Mr. Selwyn Eddy was elected a director of the bank on January 17th, 1902, at which time he was, also, a stockholder in the bank. In order to qualify as a director of our bank, one has to be the owner of, at least, ten shares of stock and then has to record his oath of office with the Comptroller of the Currency. We have nothing at the bank that he does; he does not record any oath with us. Mr. Selwyn Eddy did take the oath prescribed by the Comptroller, and when he had signed that, he was a qualified director to sit on the Board. The following were elected members of the Board of Directors in 1903: J. W. McGraw, James E. Davidson, A. J. Cook, E. B. Foss, Orrin Bump, F. P. Chesbrough, and James Davidson. There were eight directors in 1903.

Mr. Clark: You only read seven.

The Witness: Seven.

Q. Now, during the whole of the year 1902, and until the next Board of Directors was elected in 1903, state whether or not there was any privilege of any kind accorded to any director on the Board that was not accorded to Selwyn Eddy?

A. There certainly was not.

I believe Mr. McGraw held twenty-five shares of stock in January, 1905. Mr. Stoddard held in 1905, \$5,250.00—fifty-two and a half shares.

Q. That is not correct, \$5,250.00, fifty-two and a half shares is more than he had in the bank.

A. One hundred and five shares. When Mr. Chesbrough was elected a director in 1905 he had ten shares of stock. I don't know why Mr. McGraw was dropped as a member of the Board. I did not know at the time of an attempt of the First National Bank and its directors to get control of the Old Second National Bank for consolidation purposes at that time.

Q. Did you learn that that was the fact?

A. I would not say positively.

Redirect examination (continued).

By Mr. T. A. E. Weadock:

I did not look at the deposit account of Chesbrough Brothers, in 1902 and 1903; I looked through the balance for the two years.

Q. What was their average balance during the two years, the Chesbrough Brothers?

A. I did not make a close examination, but I understand—I should judge that Mr. Chesbrough's balance in 1902 would average \$15,000. In 1903, it appears to average a little less than that. There was maybe six weeks at a time he had as high as \$25,000.00 or \$35,000.00. I did find those other letters that you inquired about. I

got all those letters from the files of the Old Second National Bank, and they were received in reference to the Maltby business.

(Exhibits 171 to 220 marked.)

The letters I have just handed you all relate to the Maltby business, and are produced in answer to your inquiry. They were all received in due course of mail, and in reply to correspondence.

198 Exhibit 172, which consists of three letters pinned together, offered in evidence. Admitted as part of the history of the bank, and transactions. (Marked 172A and 172B.)

The William H. Sharpe mentioned in Exhibit 171, was a vessel agent here in Bay City. Mr. Slocum, mentioned in Exhibit 207, was a clerk in Mr. Maltby's office.

Exhibits Nos. 204, 205, 203, 202, and 200 read by Mr. Weadock.

In reply to what you have just read, I have received no letter. The Detroit Citizens' Street Railway Company paid to the bank their account due Maltby in full. I don't know how the bank is concerned with Exhibit 199.

Exhibit 199 withdrawn. Exhibit- 197 and 198 read by Mr. Weadock.

The following exhibits are all addressed to the Old Second National Bank, Bay City, Michigan:

EXHIBIT 171.

BAY CITY, MICH., Dec. 29th, '98.

From Wm. H. Sharp.

Assignment of price of ties, \$4500.00 and insurance thereon to Bank.

EXHIBIT 172.

GRAND RAPIDS, MICH., Nov. 30/98.

From Russell Wallace, P. A. D., G. R. & W. R. R. Co. acknowledging receipt of letter instructing payment of all sums due Maltby Lumber Co. for ties.

EXHIBIT 172a.

BAY CITY, MICH., Nov. 28, '98.

From Maltby Lumber Co. to Russell Wallace, P. A. D., G. R. & W. and C. & W. M., Grand Rapids, Mich. ordering payment to Old Second National Bank all sums due Maltby Lumber Co. for ties.

EXHIBIT 172*b*.

GRAND RAPIDS, MICH., March 20, 1899.

From Russell Wallace, P. A., D., G. R. & W. and C. & W. M. R. R. Co.

Vouchers for Maltby Lumber Co.'s ties made direct to Old Second National Bank, acct. of Maltby Lumber Co.; exception of 7 cars to be vouchered later.

EXHIBIT 173.

DETROIT, MICH., Aug. 28th, 1900.

From J. R. Dutton, P. A. M. C. R. R. Co.

Acknowledging receipt of separate orders payable to Old Second Nat'l Bank for amounts due Maltby Lumber Co. for material furnished during balance of year. Arranged to have these orders turned over to local treasurer for payment, as requested. Not ready to make contract for ties or poles.

199

EXHIBIT 173-*a*.

DETROIT, MICH., Aug. 28th, 1900.

From J. R. Dutton, P. A. M. C. R. R., Co.

Mr. Maltby ordered payment to Bank of amounts due him on monthly inspections of ties and materials. These orders with vouchers to be turned over to the local treasurer of M. C. R. R. Co. for payment. Number of ties delivered each month not to exceed 50,000.

EXHIBIT 174.

BAY CITY, MICH., Feb. 26th, 1900.

From Maltby Lbr. Co. to W. R. Shelby, P. A.

G. R. & I. Ry. Co., Grand Rapids, Mich.

Ordering payment of amount of account to Old Second National Bank; checks to be made payable to them. Asking for letter to give to Bank stating all money due M. L. Co. will be paid to them until notified to discontinue by Bank.

EXHIBIT 175.

NEW YORK, October 24th, 1900.

From E. W. Ressiter, Treasurer, New York Central & Hudson River R. R. Co., Enclosing original of assignment of contract bearing date of April 6th, 1900, with Maltby Lumber Co.

EXHIBIT 176.

OMAHA, NEB., Sept. 24th, 1900.

From John W. Griffith, P. A. Union Pac. R. R. Co. Acknowledging receipt order of 21st inst. to pay all sums due for materials furnished U. P. R. R. Co. to Old Second National Bank, until notified by Bank to discontinue.

EXHIBIT 177.

CHICAGO, ILL., Oct. 1, 1900.

From Carney Bros. Co.—Receipt of order from Maltby Lbr. Co. to pay all sums due them to Old Second Nat'l Bank for Cedar ties furnished Carney Bros. Co. Request granted.

EXHIBIT 178.

CHICAGO, ILL., March 8th, 1900.

To Maltby Lbr. Co.

From W. B. Mallette, P. A. Chicago Ter. Transf. R. R. Co. Acknowledging letter of March 2nd, that all sums due M. Lbr. Co. for Cedar ties to be paid to Old Second National Bank, until notified by Bank to discontinue. Will comply with request.

March 16th, 1900.

To Maltby Lbr. Co.

Acknowledging receipt of letter 12 inst. relative to assignment of claim against the Terminal R. R. Co. for ties to Old Second National Bank. Matter taken up with proper officers of Company,—decided to waive the matter of regular assignment of Maltby acct. to 200 Bank. Invoices to be vouchered in regular way, in favor of Maltby Lbr. Co., sending same, with check, to Old Second National Bank, they to secure receipt of Maltby Lbr. Co. on voucher and endorsement on check, same payable to Bank. Receipted voucher to be sent to Treasurer of the R. R. Co.,—Mr. Hy. S. Hawley, 300 Grand Central Passenger station, to obviate any future difficulty which might arise. Copy of same letter sent to bank. (Not signed.)

CHICAGO, ILL., March 16th, 1900.

From W. B. Mallette, P. A. C. Ter. Transf. R. R. Co. Enclosing copy of letter of even date to Maltby Lbr. Co. regarding assignment of claim against Company to Bank. Copy sent for information and guidance.

BAY CITY, MICH., March 7, 1900.

From Maltby Lbr. Co. to W. M. Mallette, P. A.

Chicago Terminal Transfer Co., to pay all funds due Maltby Lbr. Co. to Old Second National Bank, until notified by Bank to discontinue. Asking for letter to hand to Bank stating compliance with request.

EXHIBIT 179.

BAY CITY, MICH., Feb. 26, 1900.

From Maltby Lbr. Co. to The Pittsburg Mining Co., West Bay City, Mich., to pay amount of bill to Old Second National Bank, and send letter to show Bank.

EXHIBIT 180.

BAY CITY, MICH., Aug. 28, 1900.

From Maltby Lumber Co. to S. C. Mason, Chicago, Ill. Asking that all bills for material furnished are marked "Pay in regular course to Old Second Nat'l Bank," and if not so marked to return same to Maltby Lbr. Co. for form to be placed on same before going to the auditor for payment, so Bank will be secured.

EXHIBIT 181.

BAY CITY, MICH., Aug. 17, 1900.

From Maltby Cedar Co. to E. B. Fisher, Sec. Citizens' Telephone Co., Grand Rapids, Mich., ordering payment of all sums due or to become due the Maltby Cedar Co. paid to Old Second National Bank, until notified by Bank to discontinue.

Request complied with by Citizens' Telephone Co. (written on bottom of same letter.)

EXHIBIT 182.

COLUMBUS, O., March 28, 1901.

From Frank L. Beam, Gen. Mgr., to Bank,—Acknowledging receipt of letter to pay Old Second National Bank all accounts due them, until notified to discontinue. Will comply with request, sending vouchers direct to Bank.

201

EXHIBIT 183.

CHICAGO, April 4, 1901.

From Frank B. Stone, to Maltby Lbr. Co. Acknowledgment of letter of 3rd inst., with invoices for ties. Request to make payments to Old Second National Bank complied with.

EXHIBIT 183-a.

BAY CITY, MICH., Sept. 10, 1901.

From Maltby Lbr. Co. to The Detroit & Toledo Shore Line Ry. Co., Detroit, Mich., to pay all sums due for material furnished to Old Second National Bank until notified by Co. to discontinue.

EXHIBIT 184.

DETROIT, MICH., Sept. 12, 1901.

From Detroit & Toledo Shore Line Ry. Co. to Maltby Lbr. Co., acknowledging instructions to pay to Old Second Nat'l Bank all money due until notified by Co. to discontinue Order to be carried out.

EXHIBIT 185.

SYRACUSE, N. Y., Aug. 21, 1901.

From A. M. Michard, Sec. to Old Second Nat'l. Bank. Notification of request from Maltby Lbr. Co. to remit all bills to them. Will do so if Bank will have Maltby Company sign vouchers and endorses checks over to Bank.

BAY CITY, MICH., Aug. 19, 1901.

From Maltby Lbr. Co. to Syracuse Ry. Construction Co. New York, to pay to Old Second Nat'l Bank all money due them until notified to discontinue.

EXHIBIT 186.

BAY CITY, MICH., Sept. 9, 1901.

From Maltby Lbr. Co. to The Despatch Construction Co. Whitehall, N. Y., to pay the Old Second Nat'l Bank all money due them for material furnished until notified by Company to discontinue.

EXHIBIT 188.

PONTIAC, MICH., Feb. 4, 1902.

From W. C. Sanford, Gen'l Supt. The Pontiac, Oxford & Northern R. R. Co., Notification that the R. R. Co. would pay all sums due them to Old Second National Bank, until notified by Bank to discontinue, as per request.

EXHIBIT 189.

BAY CITY, MICH., 6-4-'02.

From Maltby Lbr. Co. to Saginaw Valley Traction Co., Saginaw Mich. Request to pay Old Second Nat'l Bank all sums due or to become due the M. Lbr. Co., until notified by Bank to discontinue.

(On bottom same letter) Compliance with request by Traction Co.

202

EXHIBIT 190.

BAY CITY, MICH., 4, 7, '02.

From Maltby Lbr. Co. to Rheo. L. Cuyler, Ass't Treas. Postal Tel. Cable Co., New York City.—Request to pay all funds due them by Maltby Co. to Old Second Nat'l Bank, until notified by Bank to discontinue. (Bottom same letter). Compliance with same order).

EXHIBIT 191.

CHICAGO, May 3, 1902.

From H. E. Poront, P. A. Chicago Junction Ry. to Maltby Lbr. Co.—notifying compliance with request to have all vouchers due Maltby Co. made payable to Old Second Nat'l Bank, until notified by Bank to discontinue, retaining the original order for authority.

EXHIBIT 192.

BAY CITY, MICH., June 3, '02.

From Maltby Co. to C. H. Plessinger, Sec'y United Telephone Co., Bluffton, Ind., instructions to pay all money due them to Old Second Nat'l Bank, until ordered by Bank to discontinue.

Request complied with by Telephone Co., on bottom of same letter).

EXHIBIT 193.

DES MOINES, IOWA, June 6, 1902.

From Geo. B. Hippee, Gen. Mgr., Des Moines City Ry. Co. to Maltby Lbr. Co. Not customary for Ry. Co. to remit funds to Banks, but complied with request.

EXHIBIT 194.

DETROIT, MICH., June 6, 1902.

From J. E. Howard, Auditor Pere Marquette Ry. Co. to Maltby Co.—referring request of Company to make payments to Old Second Nat'l Bank to Purchasing Agent of Ry., with request to grant same.

EXHIBIT 195.

BAY CITY, MICH., Oct. 24, '02.

From Maltby Lbr. Co. to The Toledo Railway & Terminal Constr. Co., Toledo, Ohio.—Request to pay Old Second Nat'l Bank anything due the Co. for material furnished until notified by Bank to discontinue.

Above order complied with by Railway Co.

EXHIBIT 197.

BAY CITY, MICH., Jan. 20, '99.

From Maltby Lbr. Co. to F. & P. M. Ry. Co., Saginaw, Mich. Request to pay Old Second National Bank all due Maltby Co. until notified by Bank to discontinue.

203

EXHIBIT 198.

BAY CITY, MICH., Feb. 28, '99.

From Maltby Lbr. Co. to N. D. Norris, P. A., F. & P. M. R. R. Co., Saginaw, E. S., Mich. Relative to letter written before requesting the Ry. Co. to pay money to Old Second Nat'l Bank. Letter if answered, mislaid. Again request letter to hand to Bank stating all funds will be paid to Bank, until notified by Bank to discontinue.

EXHIBIT 199.

BAY CITY, MICH., Dec. 8, 1899.

From Maltby Lbr. Co. to Old Second Nat'l Bank, Bay City, Mich. enclosing draft against M. B. Grove, Cayuga, Ind. for \$243.53, payable on demand. Also check of the American Trust Co. in his favor for same amount and voucher of American Engineering Co., check to be endorsed by him and voucher signed by him. Mr. Grove is to pay all the draft with this check made to his order. Have him sign voucher and endorse check and return voucher to us.

EXHIBIT 200.

BAY CITY, MICH., Nov. 11, 1899.

From Maltby Lbr. Co. to Toledo, Bowling Green & Freemont Ry. Co., Toledo, Ohio. Pay all money due us to Old Second Nat'l Bank until notified by Bank to contrary.

Accepted by Tol. Bow. Ga. & Ter. Ry. Co.

EXHIBIT 200-a.

BAY CITY, MICH., March 7, 1900.

From Maltby Co. to A. E. Peters, Sec. & P. A. Detroit Citizens Street Ry. Co., Detroit, Mich., request to pay all funds due them to Old Second Nat'l Bank, until notified by Bank to discontinue. Request for letter accepting same.

EXHIBIT 201.

BAY CITY, MICH., Sept. 6, 1899.

From Maltby Co. to The Toledo & Ohio Central Ry. Co., Toledo, Ohio. Request to pay all sums due them to Old 2nd Nat'l Bank until notified by Bank to the contrary.

EXHIBIT 202.

BAY CITY, MICH., Mar. 2, '99.

From Maltby Co. to The Iowa Central R. R. Co., Marshalltown, Iowa. Same request regarding payment of sums due.

EXHIBIT 203.

BAY CITY, MICH., Nov. 20, 1899.

From Maltby Co. to Wheeler, Holden & Co., Buffalo, N. Y. Same request regarding sums due, asking for letter to show Bank stating compliance with request.

204

EXHIBIT 204.

CHICAGO, Oct. 25, 1899.

From Wm. Ripley & Son,—Complying with request of Maltby Lumber Co. regarding payment of money due them to Bank until notified to contrary.

EXHIBIT 205.

BAY CITY, MICH., Sept. 13, 1899.

From Maltby Lbr. Co. to The Omaha, Kansas City & Eastern R. R. Co., Quincy, Ill. Request to pay all sums due Maltby Co. to Old Second Nat'l Bank until notified to contrary.

EXHIBIT 206.

TOLEDO, OHIO, March 28, 1899.

From Sam'l L. Hunt, Receiver T., St. L. & K. C. R. R. Co. to Maltby Lbr. Co., Complying with request to pay to Old Second Nat'l Bank funds for 40,000 Cedar Cross ties purchased of Maltby Co.

(Transposed.)

BAY CITY, MICH., Feb. 28, '99.

From Maltby Lbr. Co. to C. B. McVay, P. A., Toledo, St. Louis & Kansas City R. R. Co. Request to pay to Old Second Nat'l Bank funds due on ties furnished Railway Co. by them, until notified to Contrary by Bank. Also request letter accepting order.

EXHIBIT 207.

BAY CITY, MICH., Feb. 28, '99.

From Maltby Lbr. Co. to W. H. Wallace, Supt. Saginaw, Tuscola & Huron R. R. Saginaw, Mich. Request to pay Old Second Nat'l Bank funds due for ties furnished the Ry. Co. by them, until notified to contrary by Bank. Request letter accepting order.

SAGINAW, E. S., MICH., March 1, 1899.

From W. H. Hart, Tr., S., T. & H. R. R. Co. to Maltby Co. Above request complied with.

EXHIBIT 208.

LIMA, OHIO, March 13, 1899.

From F. Seymour, Auditor Detroit & Lima Northern Ry. Co. to Maltby Lbr. Co. to show letter to Old Second National Bank as their promise to pay the Bank by Maltby order all sums due the Maltby Co. for ties furnished.

EXHIBIT 209.

BAY CITY, MICH., Oct. 3, 1903.

From William Doane. (No address.)

Bell requested that Gordon make a sworn statement about getting check for ties and Gordon claims he never owed Curry any money. That the bill Curry claims is for board and a horse that Belknap got from him and Gordon says he never owed him anything. Never sold him any ties, nor has any claim on ties. Gordon claims he held the ties as Maltby Lbr. Co. ties and not Hordon's for bill
205 Belknap owed as Maltby Lbr. Company man. Horse returned to Currie or Connors. Horse was sold to us by Connors for \$30.00 and returned to them again. Currie was Connors man.

EXHIBIT 210.

BAY CITY, MICH., Feb. 9, 1903.

From Maltby Lbr. Co. to C. W. Hotchkiss, Pres. Ind. Harbor Railway Company, Chicago, Ill. Request to pay all funds due or that may become due the Maltby Lbr. Co. on materials furnished the Ry. Co. by them to Old Second Nat'l Bank, until notified by Bank to discontinue.

(Bottom of same:) "We will comply with above order."

C. W. HOTCHKISS."

EXHIBIT 211.

PITTSBURG, PA., Feb. 16, 1903.

From H. O. Hukill, P. A., Penn. Lines West of Pittsburg to Old Second National Bank,—relative to letters enclosing statement of Maltby Lbr. Co. against Pennsylvania Co. Amount \$8,816.12. Delivered today to our Telegraph Dept. bills amounting to \$5,125.00; When poles covered by bills are checked up they will be passed to our Treasurer, and voucher will be forwarded to the Maltby Lbr. Co. in your care.

EXHIBIT 212.

PITTSBURG, PA., Feb. 16, 1903.

From H. O. Hukill, P. A. Penn. Lines West of Pittsburgh, to Maltby Lbr. Co. Account against Pennsylvania Co. rec'd. Records agree with ours; have today delivered to Supt. telegraph bills to amount of \$5,125.00. As soon as poles are checked up, Treasurer will make immediate payment. Will mail vouchers in your favor to Old Second Nat'l Bank When your bills are in proper shape they will be passed for prompt payment.

EXHIBIT 213.

PITTSBURG, PA., Feb. 16, 1903.

From R. A. Reed, Ass't Treas. Pennsylvania Co., to M. M. Andrews, Cashier. Your letter relative to Maltby Lbr. Co. order in favor of your bank regarding payment of all Pennsylvania Co.'s vouchers favor of Maltby Lbr. Co. to Old Second Nat'l Bank referred to this office. Investigation shows some of amounts listed by Maltby Lbr. Co. as due Penn. Co. will be paid by C. C. & St. Louis Ry. Co. Informed Lbr. Co. that the amounts will not be paid but will send our cash vouchers in favor of Maltby Lbr. Co. to your Bank. See that such vouchers are duly dated and receipted by the proper officer of the Maltby Co. and deposited with your Bank to credit of Company.

206

EXHIBIT 214.

PITTSBURG, PA., Aug. 18, 1903.

From R. R. Reed, Ass't Treas. Pennsylvania Co., to M. M. Andrews, Cashier. Reply to letter of 15th inst. Hukill passed bills in favor of Lbr. Co. to amount of \$22,920.00 on contract for 100,000 ties @ 53¢ each. Cannot comply request to send information when shipments are received. Not responsible for any vouchers in favor of Maltby Lbr. Co. The Ry. Co. does not sanction such arrangements. The February arrangement to mail vouchers in favor of Maltby Lbr. Co. covering contract for 100,000 ties to you will stand, if such vouchers are properly receipted by Lumber Company.

EXHIBIT 215.

BAY CITY, MICH., July 8, 1903.

From Maltby Lbr. Co. to Toledo & Ohio Central Ry. Co., Toledo, Ohio. Request to pay Old Second National Bank all funds due or to become due the Maltby Company, until Bank notifies discontinuance of same.

(At bottom:) "We will comply with above order."

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EXHIBIT 216.

TOLEDO, OHIO, July 9, 1903.

From H. A. Cooper, P. A. T. & O. Cen. Ry. Co. to Maltby Lbr. Co. Received copy of proposed contract between Railway Co. and Old Second Nat'l Bank. Not proper for Company to sign contract of this character. Usual method is to make out regular invoices for material sold, then stamp, directing Railway Co. to pay amount to the Old First Nat'l Bank, or any other person, and then sign the stamped order, in ink, with name of your Company. When we receive such invoice, will recognize it to the amount due you and make a check or voucher directly to party to whom the invoice has been assigned.

EXHIBIT 216.

BAY CITY, MICH., July 27, 1903.

From Maltby Lbr. Co. to Columbia Construction Co., Milwaukee, Wis. Request to pay Old Second Nat'l Bank all funds due Maltby Co. for material furnished C. C. Co., until notified by Bank to discontinue.

(Bottom of letter:) "We will comply with above order.

CLEMENT C. SMITH, *Pres.*"

EXHIBIT 217.

From Maltby Lbr. Co. to W. B. Comstock, Pres. Comstock-Haigh-Walker Co., Alpena, Mich. Requesting payment to Old Second Nat'l Bank of money due for material furnished Ry. Co.

(Bottom of letter:) "We will comply with above order.

W. B. COMSTOCK, *Pres.*"

207

EXHIBIT 218.

BAY CITY, MICH., Jan. 29th, 1904.

From Maltby Lbr. Co. to W. R. Shelby, P. A., G. R. & I. Railroad Co., Grand Rapids, Mich. Order enclosed to pay all funds due for month of January to Old Second Nat'l Bank.

EXHIBIT 219.

BAY CITY, MICH., Aug. 31, 1904.

From Maltby Lbr. Co. to J. P. Main, Supt. Detroit & Toledo Shore Line, Detroit, Mich. Order to pay Old Second Nat'l Bank all sums due or to become due Maltby Lbr. Co. for material furnished, until notification by Bank to discontinue.

(Bottom of letter). "We will comply with above order.

J. P. MAIN, *Supt.*"

EXHIBIT 220.

DETROIT, MICH., July 31, 1903.

From J. C. Howard, Auditor P. M. R. R. Co., to Mr. A. Maltby. Is order given to Old Second National Bank intended to cover material referred to in contract with P. M. executed under date of July 17th, 1903? Order given signed by Maltby Lbr. Co., while contract is signed by A. Maltby.

EXHIBIT 221.

BAY CITY, MICH., Feb. 26, 1900.

From Maltby Lbr. Co. to W. G. Brimson, Gen. Mgr., Omaha, Kansas City & Eastern Ry. Co., Kansas City, Mo. Request to pay all money due for material furnished you to Old Second Nat'l Bank, until notified by Bank to discontinue.

Mr. H. B. Norris mentioned in Exhibit 198 was a purchasing agent. Exhibits Nos. 221, 173, 174, 175, 176 and 177, 178, 179, 180 and 181 read by Mr. T. A. E. Weadock. The date on Exhibit No. 81 is probably wrong. I think it is meant for 1904. Exhibits Nos. 182, 183, 184, 184-A., 185, 187, also, read.

Witness resumes: I don't find any reply to this letter of June 19th 1901 from the A. T. and T. Company. I don't know whether or not the bank has any reply to Exhibit No. 186 which was just read. Exhibit- 188, 190 and 196 read.

No. 196 is a reply to a request of the A. T. & T. Company. Exhibits No. 189, 191 and 192 read.

I. A. Maltby was the son of Alvin Maltby, and was in his father's office. Exhibits 193, 194, 195 and 209 read. 209 withdrawn. Exhibits 210, 211, 212, 213, 214, 215, 216, 217 and 220 read. The material that went to the Pennsylvania Company was all paid for. These are all the letters I have been able to find on the subject.

Exhibits Nos. 218 and 219 not offered in evidence.

208 JOSEPH W. MCGRAW, one of the defendants, being duly sworn, testified as follows:

Examined.

By Mr. T. A. E. Weadock:

I live in Bay City since 1878, and am fifty-five years old, and am in the lumbering and land business. I, also, dealt in vessels. I am a nephew of John McGraw, one of the founders of the Second National Bank. I have been a stockholder in that bank, since, I think 1889, until 1905 or 1906. I was, also, a director of the bank during the same time. In 1905 I held twenty-five shares of stock. I know Mr. Chesbrough, and all the officers

and directors of the Old Second National, and have known them as long as I have been connected with the bank. I knew Orrin Bump in his life time very well. He was recognized as an able banker, and an able man, and I never knew of any one that knew him to speak ill of him. I think Mr. Andrews was interested in the bank all the time that I was. He was looked upon as an honest man, and one who did his work well. The Old Second National Bank paid their last dividend in the latter part of 1903. The motion, referred to in the directors' minutes, for the 27th of November, 1903, was carried. I was secretary of the board at the time. Mr. Collins, the bank's attorney, was called into that meeting with reference to that dividend. His advice was asked, and he saw good reason why we should not declare it, and the board relied upon that advice. This was before this resolution was adopted. I think Mr. James E. Davidson was then a director, and also vice-president. His father was president at that time. In the fall of 1903, Mr. Collins was often asked, and did frequently attend the meetings.

Q. State whether or not the attorney of the Board usually attended the Board meetings unless he was requested to do so?

A. He was not. The reason why I voted to pay a dividend in June, 1903, was because we took a vote of the Board, and we all voted to declare the dividend, authorized by Mr. Collins. That was the meeting of November, 1903, that Mr. Collins was called in. I can not positively say whether or not any question was raised with reference to the payment of the dividend in June. I voted in June to pay a dividend, for the same reason that I voted in the latter part of the year.

Q. Mr. Collins was called in in November and not in June. What other reason was there for your voting to pay a dividend?

A. Because it was the action of the board.

Q. I am talking now about your action.

A. I voted because we agreed to vote. We had earned the money and we believed we were obliged to pay the dividend. I voted, also, to pay the dividend, because I believed the bank had
209 earned it; that was one of the reasons.

Q. What is the other reason that you had?—I understand that the court's ruling is that the other members of the Board could not do it. Had the matter been discussed on the Board?

A. Yes, sir.

Q. Was their reason, was their position that the bank had earned the money, that you voted for a dividend in 1903?

A. I would say that the reason was that we had earned the money, and we started to declare it. That was a regular meeting when the attorney was not called in. Not that I recollect did we ever have previous meetings with the attorney with reference to the duties of the directors with reference to paying dividends. My own idea as to when a dividend was payable, was when the bank had earned the money to pay it. I think about on February 6th, 1903, I was called upon to sign a report to the Comptroller of the Currency. I was asked to sign that report by Mr. Andrews, then cashier of the bank, and before I signed the report, Mr. Andrews had sworn to it, and at

the time I attested to that report, I believed it to be true. I believed that the statement that he had made out was a true copy of the books reflecting the true condition of the bank.

Q. The Loans and Discounts in that report were given as \$1,063,-463.44. State whether or not from your previous familiarity with the affairs of the bank, you believed at that time that that amount of loans and discounts were properly stated in the report?

A. Did I believe it?

Q. Did you believe it was worth the amount listed in the report?

A. I did.

Q. And is that why you signed it?

A. I signed it, yes.

Q. Did you in signing that report, or in signing any other report in the year 1903, intend to deceive anybody as to the condition of the bank?

A. I did not. I did keep my own account in the bank in 1902 and 1903. I did not keep any account at this time in any other bank in Bay City.

Q. These other items which go to make up this report, namely; as to the amount due the bankers, and the amount due from the bank, or the amount of currency on hand,—did you go into that condition at that time? Did you verify those items in any way before you signed the report?

A. I did not. Why, I did not take the time and could not take the time. It would take me from three to five days to go over that report.

Q. State whether or not—what was your belief in reference to these different items?

A. I believed them to be correct, from the books at the bank at the time. Yes sir. That would have influence on me. I knew the bank had a surplus fund of \$75,000.00. That surplus fund was employed in discounting paper,—used; used as a capital.

210 Q. And I ask you the same question with reference to the undivided profit?

A. Used for the same purpose. I did not know of my own knowledge the amount of individual deposits. I can not say that I knew in a general way the amount of deposit in the bank at that time; I might have at the time, but I cannot recollect that I have now. I have known Mr. Foss about twenty-five years, and during all that time he has been in the lumbering business, in Bay City. His business was one of the largest of its kind, for the past twenty-five years. I would say Mr. Foss was worth nearly a million dollars. As I hear of it, he was worth that for the last three to five years. He kept his account in the Old Second National Bank. I could not say whether or not I signed the report after him; nor could I say whether or not I signed it at the same time. I could not say whether Mr. Davidson, the other director signed at the time I did. I had nothing to do with the publication of this report in the newspaper. I never had anything to do at any time during the year 1903 with the publication of any report in the newspaper. I was aware that these reports were

made out to be sent to the Comptroller of the currency, and I was aware that they were to be made out in duplicate.

Q. Where was the duplicate of the report that was not sent to the Comptroller, the copy, whether in the bank or not?

A. I think it was kept in the bank.

Mr. T. A. E. Weadock: I presume there is no question about it. Mr. Andrews has testified.

Q. Now, coming to the next report, the one of April 9, 1903, it appears that you were one of the directors that attested that report?

A. Yes.

Q. The others being James E. Davidson and Frank P. Chesbrough? Do you know whether you signed it at the same time?

A. I could not say as to that, nor which signed it first or which last.

Q. That report was sworn to by Mr. M. M. Andrews, cashier of the bank. State whether or not it had been sworn to before you attested it?

A. That is true of all reports. It is true of that. It was true of any report in 1903.

Q. Did you rely upon the oath of Mr. M. M. Andrews as to the correctness of that report?

A. Certainly, otherwise we would not have signed them. I did.

Q. That is why you made no further examination of the report? State why you signed the report?

A. Because I believed it an honest report, a true copy of the books.

I believed it was an honest report, because it was made by Mr. Andrews, whom I believed would make an honest report, and sworn to by him before it was handed to us or to me. The amount of loans and discounts stated in that report was \$985,738.34, and at that time I believed that was the correct amount. By loans and discounts I understood is included, cash in notes and bills of lading, and loaning money.

Q. It is the paper that the bank holds discounted in the report?

A. As loans and discounts. The amount of stock securities and claims was stated in that report at \$46,453.98, and I believed that item to be correct.

Q. The amount due from approved reserve agents was stated at \$122,923.60? What was your belief as to that?

A. I believed that all those items were correct in the report.

A. At that time I did not know what the surplus fund was stated at.

Q. If it was stated at \$75,000.00, what is your judgment as to whether that is right?

A. I believe that was in the bank.

Q. And the undivided profits, at \$32,697.61?

A. I believe they had in the bank.

Q. Now state whether or not from the beginning to end of that report, on either side of the report, either as to the resources or as to the liabilities, what was your belief as to its correctness?

A. I believed the report to be true.

Q. You know—referring to the report of June 9th, 1903, had that been sworn to by Mr. Andrews before you attested it?

A. It had.

Q. The other directors attesting it were James Davidson and E. B. Foss. Do you know whether or not they attested it at the same time you did?

A. That I cannot say. It had previously been sworn to by Mr. Andrews. I attested it, because I had been asked by Mr. Andrews, and I attested it, because I believed it true, and being a director I treated it so. I knew that the law requires the attestation of the report by three directors. I don't know whether that attestation was to go to the Comptroller, or be published in the newspaper.

Q. Now, I call your attention to the report of Sept. 9, 1903, which it is claimed you attested with Fremont B. Chesbrough and James Davidson as set forth in the declaration? Was Fremont Chesbrough ever a director in the Second National Bank during this time during your time?

A. I think he was.

Q. Was he a director at that time?

212 A. If—well, if his name appears there, he was.

Mr. T. A. E. Weadock: I presume there is no question about his not being a director.

(Witness resumes:) That report had been sworn to by Mr. Andrews before I attested it.

Q. State whether or not at that time, state what at that time, your belief was as to the correctness of that report?

A. I believed it to be correct. The Comptroller furnishes the blanks upon which these reports are to be made. The report to the Comptroller was filled in. Filled in by the cashier showing the condition of the bank and sent in by the cashier, the days that he asked for.

Q. Yes. I will ask the question as to whether all items of this report of Sept. 9, as to what your belief was as to the correctness of the report?

A. My answer is the same as all the others. My answer is that I believed it to be a true report. The report of November 17, 1903, attested to by Chesbrough, McGraw, and E. B. Foss as directors, had been sworn to by Mr. Andrews before I signed it, and I believed every item of it to be true. It was during the summer of 1903 that I first learned of any efforts to displace me as director. I think Mr. Woodworth was a stockholder at the time.

Q. Did you learn of Mr. Woodworth's action in regard to that matter in that year?

A. Yes.

Q. About what time in the year?

A. In May there was a pool being formed. Information reached our board that Mr. Eddy was president of the pool, and were all accumulating stock, and were going to leave me off the board.

Mr. T. A. E. Weadock: We wish to show a pool was formed by directors of the First National, looking to the consolidation of the

two banks, and that was why Mr. Woodworth and Mr. Eddy purchased their stock.

I first listed my own stock, October 30th, 1903.

Court: Admitted as simply bearing on the reason why he sold the stock.

Witness: I sold the stock, because they were going to leave me off the board, but they didn't put me off in 1903, or make any effort to do so in the election of 1904, but I sold half of my stock twenty-five shares because I thought they were going to leave me off in 1903. During 1903 I signed no other paper, except the report of the comptroller, as a director. I had nothing to do with signing the reports that went to the newspaper; these were made up by Mr. Andrews. Before 1902 Orrin Bump was the executive officer of the bank, and received the discounts there, and the business went through his hands first. This was so even before he was president, and after he was president, it continued. He acted as executive officer before and after he was president, and discharged his duties in the same way. Mr. Andrews was assistant cashier about ten years prior to 1902. I never had anything to do directly or indirectly about deciding whether any particular paper of the Maltby Lumber Company should be discounted by the bank prior to November 17th, 1903. I never offered to sell to Mr. Woodworth nor asked him to buy, nor did I know of any other stockholder trying to induce him to buy Old Second National Bank stock; I never said a word to him, nor sent him any letter, nor anything else regarding the sale of my stock, or its value. I knew Alvin Maltby about fifteen years, and about five or six years prior to 1902; he was a member of the Maltby-Brotherton Company, a large wholesale grocery firm, when I first knew him. I knew him when he went into the lumber business in 1892 or 1893. He was lumbering in the cedar business, which is an entirely different line from logging or running a saw mill. He had a large trade with the railroads for eight or ten years prior to 1902. I have always known Mr. Maltby as an industrious man, and have never heard anything against him. The Mosher failure involved considerable money and many people, including Mr. Maltby. I once knew the liability of Maltby to the Second National Bank, which grew out of the Maltby and Mosher failure, but I can't recall the amount, nor the way it was settled. There was some land in Presque Isle County which Maltby owned and on which the bank had security. I had nothing to do with the publication of any report of the Second National in the newspapers during 1903.

Q. How did you understand, how were these reports made that were published in the newspapers and sent to the comptroller?

A. Why they were a duplicate of the reports that we had signed and attested. The daily statement kept by the bank was the statement of the bank's business for that day. I never offered a resolution on the Board to charge off any Maltby papers, prior to November 17th, 1903, for I didn't think it was necessary, nor as far as I know

did Mr. Chesbrough ever offer such a resolution, nor did any other director. I kept the minutes of the Board on that date, and recorded them correctly, and if such a resolution had been made, it would have been recorded by me, and none was ever so recorded. Motions were frequently discussed by members of the board who had formed a machine, and then, when they were put in form at the
214 meeting, it was acted on according to the way it was decided on before hand. I had confidence in Mr. Bump as manager all the time from the beginning to the end. I asked Mr. Bump about the Maltby line. I said to him it was a large line and asked him how he felt about it. He said that it need not give me any inconvenience as he had it in hand, and he had dollar for dollar in security for the Maltby paper and that the security was good. I knew the manner Mr. Bump had used in dealing with the Maltby Company regarding bills of lading, assignments of account, etc. The drafts were secured by bills of lading, and we have frequently seen those bills of lading. Mr. Bump was frequently called upon by the board to produce papers he had accepted, and Mr. Bump would always produce them. I talked with Mr. Bump about the securities before he left the bank, which he did in 1902. Mr. Maltby was dealing with the C. M. & St. P., Pere Marquette, New York Central, Michigan Central, Pennsylvania, G. R. & I., and other railroads. Mr. Bump read some of those letters which have been read here this afternoon before the board, and Bump gave us to understand that the bills of lading, and assignments of accounts were all right. The business of the Maltby Lumber Company at that time ran up not very far from a million dollars.

Q. State whether or not there were any differences between the members of the board of directors about any important matter of business in 1902 and 1903?

A. During all of these years we acted as a unit. I remember when Mr. Maltby was brought before the Board in reference to a settlement of his responsibility, but cannot recollect the date. I think Mr. Maltby turned over the property of the Maltby Company to the bank in June. I think I have it here. June 29, 1903, James E. Davidson, Trustee. That was the receipt. I do not know when the personal property of the Maltby Lumber Company was turned over to the bank. I remember Maltby coming before the bank, before a committee of the directors of the bank. The full Board was on the committee. At that time there was no committee aside from the full Board to consider the matter. Afterwards there was a committee.

Q. Do you remember a committee that Mr. Foss and Mr. Davidson were on, in reference to the personal property of Mr. Maltby?

Objected to as leading; sustained; exception for the defendant.

When Mr. Maltby appeared before the board and presented a statement of his inventory up to October 31st, 1902, the inventory was discussed at that time by the Board, but I have been un-
215 able to find it. The property as I remember consisted of, as shown by the inventory, ties, posts, and telegraph poles, but I cannot remember the amount. The meeting lasted about an hour

and a half in the old Board of Directors' room. Mr. Maltby was asked about the quality and the amount of the different forest products at his different camps. I can't remember if Chesbrough was at that meeting. I don't know who was elected to succeed me on the board of directors, or who took my place. I was not in court when Mr. Clift gave his testimony, nor did I at any time ever say to Clift that the stock I listed with him belonged to people outside. I never listed with Mr. Clift the stock of my sister, Mrs. Curtis. Mr. Curtis sold this stock, but I don't know when. The reason why he sold it was because we talked the matter over. I told him I was going to sell twenty-five shares of my stock since I was fearful that I would not be re-elected to the Board, and they said that if I was not going to be on the Board, they wanted to sell their stock. I listed with Mr. Clift three shares of stock my wife owned. She wanted to sell hers for the same reason that Mr. and Mrs. Curtis sold theirs. I was present at some of the examinations made at the bank in 1902 and 1903 by the National Bank Examiners, the examination covered the better part of two days; they generally examine the bank twice a year, but I can't say positively whether they examined it twice in 1902 or 1903. The names of the National Bank Examiners were McClellan and Sheldon; they saw all the papers and discounts in the bank, and had access to and examined thoroughly everything they wished in the bank, and while I was there they seemed to do their work thoroughly. The bank was examined by these two men in October, 1902, but I can't say whether it was made before the letter of the comptroller to the Old Second National Bank, dated October 21st, 1902, but I have a memorandum here which shows that such examination was made October 3rd, 1902. This is an ordinary memorandum book, covering the year 1902, but made in 1908, during the last trial. Mr. John L. Stoddard succeeded me as secretary for the Board, and the first meeting he recorded was that of January 10th, 1905.

JOSEPH W. MCGRAW (recalled).

By Mr. T. A. E. Weadock:

Q. Mr. McGraw, speaking of the three shares of stock that were owned by your wife that were sold, do you know why she sold her stock?

A. She had six shares of stock, and she sold half of it, because she wanted the funds. My understanding was that two reports were called for by the comptroller each year.

216 Q. Two or five; you are thinking of examinations, are you not?

A. Yes, I am. I did notice the reports as they appeared in the paper from time to time of the different banks, and my best recollection as to the number of reports in a year called for by the comptroller, is five.

Q. Do you remember when Mrs. Elizabeth A. McGraw acquired her share of stock; do you remember what year it was?

A. No. My best recollection is she had that six or seven years.

I could not say now what portions of the report sent to the comptroller was published in the paper. Live paper is paper where the interest is met regularly; well, that means live paper, where the interest is kept up. If paper is past due, and the interest is paid, it is alive.

Q. Now, what reason, if any, did you have for attesting this report that went to the comptroller in addition to the fact that the report had been sworn to by Mr. Andrews?

A. Why, because I was asked to sign it, to attest it.

Q. That was why you attested it, but what reason, if any, other than the one you have stated for believing the report to be true and correct?

A. I did. I believed the report to be true and correct, and I was asked to attest it, and I did so; and knew it required three directors, and I was asked as one of them.

Q. State whether or not it was your custom, or whether you did in the years 1902 and 1903 down to the 17th of November, go in the bank and examine the papers or correspondence of the bank?

A. I never examined any of the letters.

Q. Did you hear the letters read here the other day, and received by Mr. Andrews after, October, 1902, from the different companies that Mr. Maltby had been doing business with?

A. I cannot say positively that I heard them, but I presume some of those letters were read to our Board. Not to my knowledge were any of those letters ever shown to me individually—separate and apart from the Board. I never went and examined the letters apart from the Board. Mr. Orrin Bump had charge of the books and papers of the bank. The directors had nothing to do with the books and papers of the bank, so far as the correspondence and the books of account were concerned. Regarding the loans and discounts in the year 1903, I did know about the Maltby line of discount, and I regarded that paper at that time safe.

Q. Speaking of the bills of lading, prior to 1902, in October, were those bills of lading ever laid before you as a member of the Board?

A. No, sir; I had nothing to do with the bills of lading in my business. I never was called upon to examine them or learn anything particularly about them.

217 Q. State whether or not the letters that were read here yesterday afternoon, furnished by Mr. Andrews in 1898, 1899, 1900, 1901, 1902 and 1903, had been brought to your attention by any one in the bank, at about the time of their receipt, the letters themselves or the substance of them?

A. I think I have stated, I presume some of those letters—when that was first introduced in the bank—the Board was aware of some of those letters, whether they were all read as they came in, I could not say.

Q. What was your understanding of the fact with reference to the acceptance of those drafts made on the different companies, the Pennsylvania Company, the Michigan Central, and so on, with whom Maltby was dealing?

A. I knew those drafts were there.

My understanding was that the railroad people did not accept any drafts. The Maltby business, as fast as the paper became due, the proceeds came direct to the bank. The statement shows the condition of the bank on February 6th, 1903. I don't recall the statement of 1903.

Q. Now, something has been said about the reduction of the Maltby line of discount; how did that come about? What was done, so far as you know in regard to the reduction of the Maltby line in 1902?

A. That was brought about by the examiner notifying the bank that the line ought to be reduced. I, as a member of the Board of Directors, tried to have it reduced, from the time we were first notified. I was not at all interested in any way with Mr. Alvin Maltby, neither was I ever interested in any business with him, or with Alzina Maltby, or with the Maltby Lumber Company. The matter of this Maltby line was discussed from time to time on the Board. The Board spoke to Mr. Bump several times relative to the Maltby line. He assured us he had entire control of it; knew it well, and that we need not exercise ourselves with the safety of it. I can not recall whether it was discussed in 1901. I remember of talking with Mr. Bump about this matter before he left the bank. Mr. Bump was not enjoying the best of health the last two years before he left the bank.

218 Q. What did Mr. Bump say to the Board and to you about security for the Maltby line?

A. That is the reason he gave for not being exercised over it, because he thought we were amply secured. That was the general talk from the time we took the Maltby paper; the date I cannot fix. I relied upon Mr. Bump as knowing what he was talking about.

Q. Now the words "attest" and "correct" upon a statement to the Comptroller, what did you understand that meant?

A. Why, the law required three members of the Board to attest the statement, sworn to by the cashier of the bank, and I was asked as one of the three to sign the statement, which I did.

Q. I show you the duplicate original of the report of April 9th, 1903; I will use the one that is marked Ex. 222, being the duplicate original of the report of the 9th of April, 1903, and call your attention to the words "correct" and "attest," and ask you if those are the ones you refer to?

A. Yes, sir. I understood those words to mean that the statement above was a true copy of the books of the bank, and it was sworn to by Mr. Andrews as being correct, and three directors signing.

Q. State whether or not you believed at any time, either in 1903 or 1902, prior to November 17th, 1903, that the bank had \$400,000.00 of the Maltby Lumber Company held a collateral?

A. Now, my understanding was that the bank had collateral for the Maltby paper.

Q. When you sold your stock that you did sell, why did you leave it with Andrews instead of turning it over to Mr. Clift?

A. Because the books were kept there; the transfer would be made at the bank on the books. I did not sell any other stock at that

time. I did at some other time that year sell Valley Telephone stock, I dealt in it; I sold and bought \$20,000.00 of Valley Telephone stock. The Board selected me to do the visiting among the creditors of the Maltby Company, but I didn't go. The attorney of the bank I think represented the bank. My understanding is that he made the visit; or some one else did; I didn't. I went to the woods and checked up Mr. Maltby's statement that he made before the board; that is, what we call the inventory of the 31st of October, 1902. My understanding now is that I went over nearly all of it. It checked up reasonably well. I made a satisfactory statement to the bank. I checked his inventory and found the goods there. The condition of the property was in forest products in the shape of ties, sorted out as No. 1, No. 2 and No. 3's, unculled, bolts; there were sorted cedar poles.

219 Q. There was something said as to whether you had at one time dealt in stocks as a broker?

A. Mr. James Lewis and myself acted as agents for a Chicago firm; we bought and sold stocks, and were paid a commission for the work we did.

Q. Have you sold bank stocks for other people while you were engaged in the brokerage business in Bay City?

A. Yes, sir. Well, not sold, but listed them; I didn't make the sales.

Q. Now, speaking of this effort to push you from the Board, did you learn anything in regard to that matter from Mr. Matthew Lamont? He died prior to November 17th, 1903. What information did you receive from him?

Mr. John Weadock: We object to that as immaterial.

Mr. T. A. E. Weadock: What I expect to show is——

Mr. John Weadock: Might as well admit the testimony as to hear what you expect to show. The question is objected to as incompetent, irrelevant, and immaterial.

The Court: What is the purpose of this?

Mr. T. A. E. Weadock: That he tried to get this man's proxy to vote against him.

Mr. John Weadock: I know what you have in mind. You have heard that sworn to on the stand.

Mr. Humphrey: I take an exception to that statement made in the presence of the jury.

Mr. John Weadock: The jury will take care of themselves.

The Court: Under counsel's statement I will permit the testimony.

Q. When was that?

A. It was along the middle of the summer of 1903; it was prior to the election of the first of January, 1904. It was before October, and before I listed my stock with Mr. Clift, about three or four months before.

Q. What was your information obtained from Mr. Lamont?

A. He said: I notice there is a disposition to remove you from the board, and that Mr. Woodworth has solicited my proxy. I cannot recall anything more he said.

Q. I don't want anything you found out before you listed your stock with Mr. Clift; I ask you whether you learned before you listed your stock with Mr. Clift whether or not Mr. Woodworth obtained Mr. Lamont's proxy?

A. He did.

220 Q. Did you hear about it before and at that time?

A. I did.

The Court: I want the jury to understand that this is not admitted as disputing the testimony of the plaintiff, or impeaching him; it is only proof of what this man may have thought, and its possible effect on his selling the stock?

Witness: I wish to say that I have no knowledge Mr. Woodworth got Mr. Lamont's proxy. I know he didn't because Mr. Lamont himself told me he did not give it to him.

Cross-examination.

By Mr. John C. Weadock:

I became connected with the Second National Bank in '78 or '79, and continued with the Old Second National Bank as a director until I was not re-elected. During this time I was, also, lumbering in on Ontonagon and Marquette Counties, but my home was in Bay City. The board had meetings and extra meetings, and when I was at home, I attended them. The president of the bank passed on the discounts. He took in the paper, and afterward reported it to the board, along with the business of the week. All papers discounted by the bank were entered in the book and that book was read to the board, and the board knew of every bit of paper so discounted, and if that paper was renewed, they would know of its renewal. By these means the board was advised every time of the acceptance and discount of Mr. Maltby's paper, and knew all about it, but they did not always vote on the length of time, the paper had to run. The letter "R." was placed opposite the paper to show that it was a renewal. The amount, the maker, and the place payable were all shown.

Q. So that as to this Maltby paper, and we will confine ourselves to that, every paper that the Old Second National Bank had was read over to the Board of Directors, and every renewal of it was, also, likewise read?

Objected to as incompetent, because the time is not limited, and because the books themselves which are here, are the best evidence of what was entered in them.

Overruled; exception.

A. Yes, sir. And while acting as a director of the board, I paid attention to these papers as they were read off. If there was any collateral attached to, or called for by the paper, that fact was, also, read generally.

Q. Was that not the rule, and was it not always true? And, do you know of a single instance where it was not true?

Objected to as immaterial, and as not the best evidence; overruled; exception.

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A. It might be.

When there was a large amount of paper from one individual, the security would be noted when the paper was taken, but if that paper was renewed, the security would not be noted in the book again, and if a new member came on the board, he would not know whether it was secured or not, but the original paper would be secured, and the trouble was not taken to note what the security was from one renewal to another. I knew as well as I could find out what the condition of the paper of the Maltby Lumber Company was. In 1902 and 1903 I did not attend every meeting, but I attended the greater part of them. I knew Mr. Bump well, and I was with him a great deal, although I did not see him every day. I knew Alvin Maltby in 1895 when I was a director of the bank. The Second National made a list of its losses on the Mosher & Son paper. Some of this paper may have been endorsed by Alvin Maltby.

Q. Don't you know that there was \$100,000.00 of that paper charged off, and the stock reduced \$100,000.00 on account of losses made in that failure?

A. Yes, but I can not say how much of a loss the bank sustained, nor that the stock was reduced principally on account of the loss, but I do know that no part of the reduction was made by paying anything back to the stockholders. After the failure of 1895, Alvin Maltby made arrangements with the Old Second National Bank for a line of credit at that bank, to the best of my recollection. As a part of the consideration for that arrangement, he was to pay some of this old paper, but I don't know what the arrangement was, nor what was paid.

Q. Did you know that Mr. Maltby went through bankruptcy?

Objected to, not the best evidence; overruled; exception for the defendant.

A. I don't know.

Q. So that you knew at the time he opened the account with the Old Second National Bank that he was without means, did you not?

A. Well, I never understood he was without means.

Q. What did he have?

A. He was always doing business.

Q. What did he have?

A. I don't know.

Q. Did you know of anything that he had?

A. I didn't know what he had or what he didn't have.

Q. Didn't you make any inquiry?

A. No, sir.

Q. When he commenced business with the Old Second National Bank didn't you require of him that he should make an assignment to the Old Second National Bank of any claim he had on
222 account of any forest products he sold to any of his customers?

A. What year?

Q. When he commenced business in 1895.

A. No, sir, I don't remember any such condition.

Q. Did that condition exist in 1896 and '7, or in 1898, 1899, or 1900?

A. I cannot say.

Q. You heard the testimony yesterday before this jury, and your letters, and you know what years they referred to, do you not?

A. Yes, sir. I think 1898, 1899, 1900 and 1901 and 1902.

Q. Then you do know in the years you just now mentioned that the bank required of Maltby that he should make an assignment of the claims against his customers; an assignment of forest products sold to them to the Old Second National Bank?

A. Yes, but I didn't think you had reference to that; those letters I was familiar with, asking Mr. Maltby to have those securities turned over to the bank, that is true.

Q. Was that because you were afraid Mr. Maltby would not pay the bank, if he got the money in his hands?

A. No, we thought it was a safer way to do the business.

Q. At that time you knew that Mr. Maltby was not financially responsible, did you not?

A. No, we didn't recognize it that way. We knew he had a large line, but we thought that paper would be met, and we did that as a protection, and I think it was suggested by the Board to have that work done just as they did.

Q. So you relied upon these assignments made and delivered to the bank when you permitted Mr. Maltby to get the lines of credit he got from the bank?

Mr. T. A. E. Weadock: That is objected to as incompetent, assuming something that is not in evidence.

Overruled; exception.

A. I didn't have any of that business to do at all. That was in the hands of Mr. Bump.

Q. Didn't you vote and move to approve every bit of this Maltby line, from time to time, over and over again, during the time it was in the bank?

A. I acted as one of the board.

Q. And voted to approve the line, and voted to approve every paper in the line?

Objected to as incompetent, irrelevant and immaterial; overruled; exception.

A. I did.

Q. Did you do it without knowing what you were doing?

A. I did it wholly upon the knowledge of Mr. Bump.

Q. Absolutely?

A. Absolutely.

223 Q. Then all you remember of this case is your knowledge of Mr. Bump and the knowledge of Mr. Bump's faithful and honest transactions?

Objected to; overruled; exception for the defendant.

A. I was guided largely by the knowledge we received from Mr.

Bump, as to the treatment of the Maltby paper. I was also guided by the action of the board, as we talked things over on the board; that is the way I obtained my information. I had no information regarding the financial responsibility of Mr. Maltby, that I haven't stated on the stand.

Q. Now, during all these years that you were a director of the Old Second National Bank (say beginning with the year 1900)—I won't go back of that for the present—you were on the examining committee of the paper of the bank every year, and at every examination?

Objected to; overruled; exception for the defendant.

A. I cannot say as to every time, but nearly every time. During those years, I examined the bank as a member of the committee. This was during 1901, 1902 and 1903, but I did not participate in every examination. At present, I can not remember any time when I was not present. Mr. Chesbrough was with me during some of these examinations, but I don't remember which ones. The record shows that.

Q. Now, in the year 1902, you knew that all of the paper of the Maltby line was without security?

Objected to as incompetent; overruled; exception for the defendant.

A. That is a hard question for me to answer. I can not say that is true.

Q. It is the year 1902 I am speaking of; what security did the Old Second National Bank have for a single dollar of the Maltby line?

Objected to; overruled; exception for the defendant.

A. I don't know. A large portion of the loan to the Maltby Lumber Company during 1902 was represented by drafts. They might have been all represented by drafts; I could not say all, but I presume that is true. Those drafts were in the possession of the bank, and were drawn by the Maltby Company on railroad, telegraph and construction companies, all of which resided outside of Bay City.

Q. Not a single one of those drafts was forwarded for acceptance, or accepted by the firm or corporation upon which it was drawn?

Objected to as incompetent; overruled; exception for the defendant.

224 A. That is true, they were not. I can not remember the amount of the drafts in 1902. I presume it is true that the amount in 1902 was as high at one time as \$463,000.00, and not below \$400,000.00.

Q. And you knew that every dollar of that line, over and above ten per cent. of the undivided profits and surplus, and capital, was in violation of law?

Objected to as incompetent, being a legal question; overruled; exception for the defendant.

A. I never looked at it that way.

Q. Mr. McGraw is it not true that during the entire year of 1902, the matter of the Maltby line was discussed by the board of directors at nearly every meeting?

Objected to because it has been asked and answered on this cross examination; overruled; exception for the defendant.

A. It was spoken of a great many times that year at our meetings.

Q. And it was talked of between the directors whenever two or more of them happened to meet?

Objected to as incompetent; overruled; exception.

A. Not always when we met, but often.

Q. And it was discussed between you and Orrin Bump when you met?

Objected to as incompetent; overruled; exception.

A. When I was with him, we would often speak of it.

Q. And it was discussed between you and Bump and Chesbrough when you walked down the street together?

A. Yes, but not always. We did walk up the street frequently after the meetings of the board, but we did not always speak of that subject. There have been times when we walked down the street together, and have not spoken of it. I was the secretary of the Board of Directors, and kept the minutes.

Q. Will you explain what items were recorded, and what was done that was not recorded?

Objected to as the records are the best evidence; overruled; exception for the defendant.

Q. I want the juror's question answered: "Q. I would like to have you ask the witness why it was that none of this appeared on the Board of Directors' minutes?"

A. Why, it was the general discussion and the minutes would not contain that. If we would have a general discussion about a subject, we never inserted it in our minutes.

The Court: The minutes show what action was taken?

A. Merely what action was taken, but the subject matter and what was talked of on the Board every time we met would not appear on the minutes, but if there was an action taken, if the Board
225 agreed to do a certain thing, that was recorded. The power was vested in the entire Board, not any one individual; one individual could not do as he chose, but if there was any action taken on the Board then the minutes would show just what that action was.

Q. Now, Mr. McGraw, whenever any action was taken it was recorded in the minutes you say?

A. Why yes, that is my understanding. Whenever any action was proposed, any resolution offered, it was recorded in the minutes.

Q. If there was a resolution offered, and it was supported, it was placed on the minutes?

A. Or the motion made. Well, if a motion was made, it was

generally supported, and if it was it was placed on the minutes, and my understanding of it is that it was entered on the minutes. At every one of these meetings where we have discussed the Maltby line, as I have said we did, we also approved the Maltby paper.

Q. Now, during the early fall of the year 1902, you exerted all the abilities that you had for the purpose of reducing this Maltby line, did you not?

A. I worked with the balance of the Board; yes, sir; on that line, and I did everything I could to reduce it. I was entirely familiar with the amount at that time, although I don't remember it now.

Q. You knew from day to day how many dollars the Second National Bank had advanced the Maltby Lumber Company upon these drafts?

A. Well, I could not carry that in mind. I would be familiar with that as the matter came up from time to time, but from day to day I could not answer that question.

Q. After June, 1902, you did not make any new loans to Mr. Maltby, did you?

A. I cannot say. I cannot date back to that time. If the records say so, that is true.

Q. Now, this is important, and I want your recollection outside of the records, because so much did not go on the records?

A. I cannot bring that to mind. I do not think from the time I commenced to reduce the line, I took on any new paper, except renewals. It was my purpose not to. We tried to reduce the line, and that would be the purpose. In October, 1902, a letter was received from the comptroller of the currency in relation to this Maltby line. The Board of Directors had that letter submitted to it at a meeting. At that time, Mr. Bump was not present; he was away; I think he was in Washington. My recollection is that he was not back to the bank after that for the purpose of doing any business.

Q. And for more than a year at that time, Mr. Bump's health was broken, was it not?

A. He didn't have good health, that is true. I don't know about his night's rest.

226 Q. And you knew the condition of his health was attributable, to some extent, to his worry over this Maltby line?

Objected to as incompetent.

A. I could not answer that. I could not say that. I cannot say that the breaking down of Mr. Bump's health was caused by worry over the Maltby line.

Q. You knew in 1902, the breaking down of his health was attributed by him to some extent to worrying over the Maltby lines?

A. I never heard him make use of such an expression, or anyone else. I don't think for more than six months prior to November 7th, 1902, Mr. Bump gave much attention to the business. I cannot say as to when I gave him his vacation.

Q. After he took his vacation, didn't you go to Orrin Bump and ask him to come back and give his attention, so far as he could,

to just sit around the bank and give his attention to the Maltby line?

A. I would say I never made such a statement to Orrin Bump in my life; I cannot recall a time when I ever made such a statement to Orrin Bump. I remember of being sworn before as a witness in this case.

Q. Were you asked anything with relation to getting Orrin Bump back to the bank or getting him to give his attention to this paper?

A. I cannot recall it now. If I said so, then I stand by it, but I cannot recall it now. The line was not giving me any trouble at all. I carried the same amount of flesh. I was elected a director of the bank; I did all in my power and worked with the Board, to get the best results out of that Maltby paper.

Q. Well, this letter from the Comptroller is dated October 21st, 1902, and it says: "The report of an examination of your bank made on the third instant has been received, and has been carefully considered." You remember that letter?

A. I do. The examination of the third instant is the same examination I referred to in my testimony of yesterday when I pulled your memorandum book out of your pocket, and said the examination was on the third of October. I was present at the time the Examiner made that examination or during a part of the time at the bank, and the Examiner talked with me about the line of paper.

Q. And he criticized the line?

Objected to as immaterial; overruled; exception for the defendant.

A. I talked with the Examiner about the paper; I asked him if he had any suggestions to make as to the treating of the paper. He told me that we were doing all we could and rather not criticizing but rather supporting our contention, the way we were treating it; agreed with us; said we were doing all we could, that is a true statement made to the Examiner.

Q. And at that time, he referred to your reduced line?

A. He talked about the Maltby paper reducing it, and about all its phases, a general conversation, which took place, as I recollect, in the Board Meeting. I think he asked for a meeting of the Board. I can not say that he did this, because of this Maltby line, but he was in the meeting, and discussed the Maltby line in the meeting. I cannot say whether or not he said that he would report it to the Comptroller of the Currency.

Q. You understood he would from what he did say?

A. Well, he did. I know he did report it. That meeting was on the third of October.

Q. You didn't make any record of the fact you did not have a meeting and the Bank Examiner was before you, and you were talking about this Maltby line; you didn't make any record of that?

A. I don't know; the record will show that.

Q. You know you didn't make any record of it?

A. I would not say I did not. That is in 1902, and I can not recall

whether I did or not. The record will show whether I did or not. If it does not show any, I presume then there was none made.

Q. Now, this further says: "About 40% of the loans and discounts of the bank consist of drafts on railroad and telegraph and telephone companies, and so forth, of shipping bills attached, discounted by the Maltby Lumber Company. Those drafts are not forwarded for acceptance or collection. In order to come within the exception of Section 5200 relative to Bills of Exchange, these drafts must be drawn against commodities in process of shipment from seller to buyer, and be accepted by the parties against whom they are drawn." You knew that at that time?

A. Yes, sir. I also knew that the drafts were not so accepted.

Q. You knew they were not drawn against actual shipments made and being forwarded by a common carrier?

A. The bills of lading and the Inspection Certificates were attached—— You mean to say if I didn't know anything about that?

Q. I mean to say at that time you knew they were not drawn against shipments then presently being made; you knew these drafts were not drawn against shipments which were then being presently made; against goods in transit?

A. No, I cannot say that. I have got to have some better——

228 Q. I show you this red box which is said to contain all the Maltby paper and all the bills of lading, and all the certificates of the inspectors?

A. Yes.

Q. From your knowledge of that, do you think you can go to that box and pick out a single instrument that shows at that time, viz: October 21, 1902, that there was any shipment on the road from seller to buyer?

Objected to as incompetent, and not proper cross examination, not referred to on direct examination, and as not the best evidence; overruled; exception for the defendant.

A. I cannot say now. I don't know anything about those papers. I could not identify a single one of them.

Q. Why, you hadn't made a new loan to Maltby prior to October 21, 1902, and after the first of June, 1902, because during that entire time you were reducing the line, were you not?

Mr. Humphrey: I object to the form of the question, using the singular, you.

Objection overruled; exception for the defendant.

A. That is true. I knew it didn't take any four months to make any shipment to any place the Maltby Lumber Company was doing business with.

Q. You knew there wasn't a live bill of lading in possession of the Old Second National Bank at that time representing actual shipments in process from the seller to the buyer?

Mr. Humphrey: In 1902 these things were not only being shipped,

but the railroad companies were being notified of those shipments between June and October, and they are writing back stating that they would send the proceeds when collected to the Old Second National, and the records show that The Maltby Lumber Company were making the shipments to pay the Old Second National, and their customers were writing the bank that they would pay on the shipments made. These letters are in evidence, and the statements upon which the witness is being examined, are not true.

Overruled; exception for the defendant.

A. I can't answer, because I can't recall the facts. I believe that the entire Maltby line was secured at that time. I can not say that I know that during that period the Maltby line was good or bad; that is, during the year 1902 and up to February, 1903. I am not familiar with the answer made by the board to the letter Mr. Andrews submitted. I heard the letter read, which Mr. Andrews wrote to

Mr. Bump who was in Washington then. I knew at the time

229 that. The answer was directed to be sent by the board.

Among other things, it reads: "At the suggestion of the directors, I wired you today to call upon the comptroller of the currency—it was understood at the board meeting today, and fully discussed, and I was requested to advise you of their action." I remember now it was considered at that meeting I was appointed as a committee to make certain examinations, but I did not find time to make those examinations personally, but others did it, and the board received the reports, including myself, and from these reports, made during the month of October and later during 1902, it was shown that these different companies were indebted to the Maltby Lumber Company for a very small amount.

Q. Now, it developed that this amount was not twenty per cent. of the amount of the drafts the bank actually had?

Objected to, as an incorrect statement of the testimony; the witness has said he knows nothing about it, and the counsel is trying to testify himself, and I object to it as being incompetent and not proper; objection overruled; exception for the defendant.

A. That may be true, but I can't recall.

Q. You knew that the amount that was shown to be owing by these several companies to the Maltby Lumber Company was a small percentage not exceeding twenty-five per cent. of the paper then held by the Old Second National Bank, drawn by Maltby upon the several companies, the condition of which had been investigated?

Objected to as improper, and as accusing the witness, instead of asking him for his opinion; overruled; exception for the defendant.

A. I knew the face of the draft was not paid, but as to the percentage, I can't say. I can't say that I understood how much there was at that time.

Q. Do you know it was more than two hundred thousand dollars?

Objected to as incompetent and immaterial; overruled; exception for the defendant.

A. I can't say.

Q. And then you say, do you not, that you then knew that the Maltby line was good?

Objected to; overruled; exception for the defendant.

A. I said I believed I didn't know whether it was good or not.

Q. Do you now say that about October 24, 1902, you believed the Maltby line was good?

A. I cannot say.

230 Q. You don't now say you had thought at that time or you believed that the Maltby line was good?

A. I cannot say that.

Q. Didn't you so testify yesterday?

A. I testified yesterday that I signed those reports, believing them to be correct and true. There was a meeting held during the month of November by the board, and Mr. Maltby was there, and submitted an inventory of the forest products, including his lands, and probably a statement of his net worth. I am not a bookkeeper and can not keep books, but know in a sort of a way how books should be kept and I know that if a man makes a statement of his net worth, he must show his assets and liabilities, and if Mr. Maltby showed his net worth, these amounts must have been on the statement, but I can't recall what the statement or the inventory showed, for that was ten or twelve years ago.

Q. Upon the other trial of this case, did you give this testimony,—on page 508,—“This statement of Mr. Maltby submitted in October, 1902, shows that he gained that year \$97,092.79; that his net investments on October 31st, 1901, but \$88,293.16; that his then present worth October, 1902, was \$185,385.95?”

A. Is it your best recollection that this is the statement that was used at that time?

A. I think it was.”

Q. Do you mean to say that a firm making \$97,000.00 a year, and having a net surplus of \$185,000.00, and reducing its paper held by the bank, was in such condition that you, believing that statement, put a man in charge of that man's business, as a representative of the bank?

A. We put him there for the purpose of protecting the interest of the Maltby Lumber Company.”

Q. Did you believe Maltby had made \$97,000 that year?”

A. I believed the statement.”

Q. And that he had \$185,000 to the good?”

A. I didn't have any other reason——”

Q. Did you believe it?”

A. I did, and so did the board.”

Q. And believing that statement you put a man in charge of the business?”

A. That is right.” Did you give that testimony?

Mr. Humphrey: Before that question is answered, I want to call attention to the fact that this is part of the gentleman's cross examination on the former trial, and that he then had the statement Mr.

Maltby furnished in his hand, and was reading those items; and I submit it is not a contradiction of his testimony, and that it is improper and incompetent to ask him this question under the circumstances.

Objection overruled; exception for the defendant.

231 A. I could not tell the dollars and cents; I must have had the statement read to me, or I read it myself. I can not recall amounts of money like that. If you have read the statement, and it was a statement made or read by Mr. Maltby, I accept it, all you read.

(Mr. John C. Weadock, at the request of defendants' counsel, reads to the witness his testimony on the former trial immediately preceding that above quoted.)

Q. Now you knew that in that statement, and it was called to your attention on the other trial, that Mr. Maltby had marked up his real estate values to the tune of \$64,000 did you not?

A. Whatever it was; I cannot recall.

Q. And of an apparent profit he had made that year of \$97,000, there was \$64,000.00 of it which was marked up on the real estate?

A. That I cannot recall.

Q. You knew in that statement there appeared an item of personal accounts as distinguished from accounts receivable which amounted to approximately \$75,000.00?

A. I presume that is true, I cannot recall the amount now. I made an examination of the inventory of the forest products, but not of the lands. I went to a place called Bently, and another place Hard Luck. Then I went to a station, I can't recall the name of, but it was on the G. R. & L. and in Emmet County, where there was a large amount of cedar. The name of this town, I think, was Temple. I went to the yards in Bay City, but I did not go to Pinconning for, as I recall it, they had no property there. We sent a man to the River Rouge in Detroit, where they had some property. These are the only places I went to.

Q. At that time did you know anything about the cedar tie and pole business?

A. I knew what constituted a No. 1 tie and a No. 2 tie and a pole.

Q. Had you done anything in the business?

A. One year I sold some. I knew that the property contained in the inventory was widely scattered throughout the entire lower peninsula, in about as many as fifteen places. The stuff was brought out to the track.

Q. And you ascertained in the examination you made that a large number of the poles had already been sold to the Western Union Telegraph Company, and the Western Union Telegraph Company had paid for them as they were being paid for by the Maltby's?

A. Some of that was true. I can not recall if the same was true of the American Bell Telephone Company. I knew it was the same of other customers of the Maltby Lumber Company. The property, as a whole, was not paid for, but an advance had been made on certain parts of the property. I can not say as to how high some ad-

vances were made. I did report what I learned to the directors of the Second National Bank; that is, I reported by making a statement and handing it to the board. I do not know where that statement is now. It was a recapitulation of their yards that I visited. I handed in my paper and read it to the board, and we compared it with his statement, and checked the items as we found them. I made no report, except in reading the statement,—I would make oral remarks. I would make explanations. I acquainted the entire board orally in connection with the written instrument, whatever it was, of the condition I found.

Q. Now, Mr. McGraw, you put a man in charge of the Maltby business, did you not?

Mr. Humphrey: That is objected to.

A. I did not, but the board did. I was a part of the board, and acquiesced in doing it. I advocated it. The man that was put in charge was Mr. James Lewis, whom I had known for a number of years, as he was an honest and capable man. He was put in charge of the business from the start to the finish. When he first assumed charge of the business, Mr. Maltby was with him. I don't know how long he was there. As I understand it, Mr. Lewis had the entire charge of the business. I did not hear Mr. Lewis' testimony in this case. My understanding was that Mr. Lewis was responsible, was to have entire charge of the business, and report it back, weekly. I would see him once or twice a week after he went into that position. I don't think I ever went up to Mr. Maltby's office where Mr. Lewis was, half a dozen times.

Q. Was the fact that Mr. Lewis was put in charge of the business, or whatever position he had in connection with the business, made public, or kept secret?

Objected to as immaterial; overruled; exception for the defendant.

A. There was never any motion or any talk in the board to keep that secret. In fact most every one knew that he was there; every one of the board did. Everybody in town knew that Jim Lewis was engaged in that office. I think many persons in Bay City knew that he was there for the Second National Bank. Mr. Carrington knew it. He was not a stockholder in the bank then.

Q. Is it not a fact he was put in there and that Mr. Lewis' connection was to be held out as an employee of the Maltby Lumber Company, and it should not be known that he was there representing the Old Second National Bank?

Objected to, as incompetent and irrelevant; overruled; exception for the defendant.

232 A. I will not say that is a true condition at all. I will say he was in there to look after it. Whether it was kept secret or not, I never heard anything about it. I never heard the board say we should keep that secret, and I didn't say it and I didn't care who knew it as far as myself was concerned. We were working for the interest of the bank, and the entire board selected this man.

Q. You held meetings of the directors of the Old Second National Bank outside the office of the Old Second National Bank at that time, did you not?

Objected to as incompetent.

A. It was in the same building, not the office—I can only recollect at this present time one meeting outside the Old Second National Bank where we met and that was held in the Reid office. I can not say I ever attended any meetings in Mr. Collins' office. If there is any testimony to show I did—that is a good while ago—but I will say now not to my recollection. I do not recollect of ever attending a meeting in Mr. Collins' office relative to the Old Second National Bank. From these reports made by different parties and prior to December 1st, 1902, I had learned that Maltby & Company had made representations that were not true in relation to his business and his paper.

Q. You had learned he had made shipments to himself and had used those bills of lading and attached them to drafts upon which he had gotten money from the bank?

A. So reported.

Mr. Humphrey: This is all objected to.

I had learned he had used certificates of inspection made in one yard, and when the product was re-shipped to another yard, he would use the certificates for the same inspection.

Q. You had learned he had misinformed you as to the amount these different companies owned?

A. Yes, sir, it turned out so afterward.

Q. You knew it at that time. It was so reported at that time?

A. Whatever that time was is true. I can not say right now, but whatever the date was, if we received that information, I knew it. I can not say when Mr. Collins went to Chicago, but I understood he did go. When Mr. Collins came back, he made a report at that time, and others made reports. This investigation was made when Mr. Collins went to Chicago.

Q. And you knew Mr. Collins had met Mr. Chesbrough in Chicago, and had gone to the office of the railroad companies to ascertain what the facts were?

234 Objected to as incompetent; overruled; exception for the defendant.

A. Yes, sir. I think it is true that at this time the bank had written letters to different parties that were supposed to be customers and buyers of the Maltby Lumber Company in relation to what they actually owed the Maltby Lumber Company and had received replies thereto in pursuance of this investigation that the board was making. I suppose those letters were read to the board, I cannot recall now.

Q. And you knew from those letters from the different debtors of the Maltby Company, the alleged debtors, the drawees of these drafts, that the indebtedness to the Maltby Lumber Company was a

very small amount in comparison with the drafts drawn against them in the bank?

Mr. Humphrey: I object to that. Those papers are in evidence, and they are the best evidence of what they show.

Overruled; exception for the defendant.

A. I don't know the amount.

Q. You know that was a fact, the indebtedness was very much less than the amount of the drafts?

A. I can not say I did know what the amount was, whether it was twenty or thirty or fifty or seventy-five per cent.

Q. Did you make any investigation to find out?

Mr. Humphrey: We object to that; we are not charged with negligence.

Overruled; exception for the defendant.

The Court: It is not admitted for the purpose of showing negligence, but what he knew.

A. I didn't know, I didn't make any effort to find out.

Q. Do I understand you to say, Mr. McGraw, at the time these letters were sent to the various customers of Maltby for the purpose of ascertaining what they actually owed the Maltby Lumber Company, you did not keep in touch with the situation to see what the true conditions were?

Objected to as incompetent; overruled; exception for the defendant.

A. If that information was received at that time; whatever that information was, was made known to the board to all the members if they were there. All the members were not always there.

235 Moved that the last sentence be stricken out, as it appears from the testimony that Mr. Chesbrough was absent in Chicago, from the latter part of October, 1902, until March, 1903, except for the meeting of November 23rd; overruled; exception for the defendant.

Q. You knew at that time in November, and also, in December, 1902, that there would be a large shortage of this Maltby Company line, which would mean a large loss to the Old Second National Bank?

Objected to; overruled; exception for the defendant.

A. I might, we realized that there might be some difference, but I can't say that I knew there would be a large loss. A large line of paper is always subject to a loss. I didn't think the paper was absolutely good, for I couldn't say that of any line. There is always a shrinkage in every line.

Q. I am asking you whether you believed at that time that the line was good?

A. I did to a certain degree.

Q. And you won't say what that degree was?

A. I cannot tell. There was some arrangement made, whose date I don't remember, by which the bank took over all the assets of the Maltby Lumber Company not by conveyance, but by consent of the Maltby Lumber Company. No papers or conveyances were made at the time; they were made later. I think in June, 1903, when they were made out to James Davidson, trustee.

Q. You knew the papers themselves were made in the name of James Davidson, did you not?

Objected to as the papers are here; overruled; exception for the defendant.

A. Certainly; taken by James Davidson as representative of the bank, but I understood that Davidson took as trustee for the bank; but the word "trustee" I don't think appeared in the instrument.

Q. Now, were they not taken in the name of James Davidson, because he was a man of large affairs, and could acquire property in any place without causing comment, and in order that the public might not know that they were taken for, and in the interest of the Old Second National Bank?

Objected to; overruled; exception for the defendant.

A. I never heard any intimation of that on the board, nor did anyone.

Q. Do you say you were perfectly willing, during 1902 and 1903, for the public to know that the Old Second National held Maltby Lumber Company paper to the amount of over four hundred thousand dollars?

236 Mr. Humphrey: Objected to as to whether he was willing or not; overruled; exception for the defendant.

A. I will say that the public, as we understood on the board, was aware of the fact that that amount of paper existed in our bank during 1903; for it was talked of, and we heard of it; there was no secrecy about it, the stockholders who owned the stock knew of it.

Q. When did you understand the public was aware of it?

Objected to as incompetent; overruled; exception for the defendant.

A. As far as myself was concerned, I didn't care, as an officer of the bank, that was a secret. It was part of the board's business to keep their business to themselves, and as an officer of the bank, I had no right to speak of it, and for myself, personally, I didn't care a picayune who knew it, or what the results might be. I am answering your question as well as I can. I heard part of Chester L. Collins' testimony given on the last trial of this case.

Q. I ask you whether you heard Judge Collins say on the witness stand, at the former trial of this case, that the deeds of real estate were taken in the name of James Davidson, and not otherwise, and he gave the reason therefor?

Objected to as immaterial.

The Court: I am inclined at present to think your objection is good, but the question may be asked.

Exception for the defendant.

A. I can not recall such a statement. I understand what loans and discounts are. All loans and discounts made by the bank, as well as all other business transacted by the bank, are kept track of by the bookkeeper, whom I knew. I knew that all the loans and discounts would appear on the books from day to day, and I knew that the entire Malt-y line was included in the paper kept on the books, and appeared in the daily statement from day to day, and I knew when the paper was accepted by Mr. Bump, and approved by the Board of Directors, that it would be so entered on the books, and would be so reflected in the daily statement, but a great deal of them would appear at an amount twenty per cent. less than its face amount.

Q. What do you mean?

A. I mean in taking paper,—oh, the original would show, but would not show what was done with it. The item of loans and discounts would be the face of it. The books were not kept under the direction of the board; and I never heard an officer suggest any ideas regarding the keeping of the books; that was left to the president and cashier, but in a general way, I knew how the books were kept, and I knew that when this paper was taken, it was arranged that it would go in as loans and discounts, and would appear on the books as such, and in the daily statements, also, which showed the amount of the loans and discounts, and I knew, also, that from this statement which would include the Maltby paper, a statement would be made to the comptroller of the currency when called for by him, and also, that it would be published in the Bay City "Tribune," over the names of three directors, attesting to their correctness, and I knew that my name was quite universally published as attesting to the correctness of these reports; that is, the first five reports made during 1903, and prior to that time including 1901, and before that. It was the custom for the cashier of the bank to call up different directors, and ask them whether they would be in town to sign the report to the comptroller, and I knew that when this paper was received, and carried as loans and discounts, that it would be stated in these published reports as loans and discounts of the bank at face value. I knew the forms gone through in charging off paper at the bank. After it was charged off, the paper would still be retained by the bank, and it would be worth just as much to the bank, but it would not appear among the loans and discounts; it still remains an asset of the bank, and so I understood at the time. The statement made February 6th, 1903, included among these items of loans and discounts, and on the asset side of the statement, all of the Maltby line, but as I said before, I can't say that line was all good, for I can't say that any man's account is all good. I couldn't say that the whole line was entirely bad. I can't say that the Old Second National Bank could not possibly collect fifty cents on the dollars of the Maltby paper, and such was not my judgment at that time.

Q. And yet you kept it all under loans and discounts?

A. Part of it. The Board did.

Q. I suppose the board could have charged off a portion of this paper to profit and loss against \$75,000.00 of undivided profit the bank had at that time. They could have charged it off, also, against the capital of the bank, but I or anyone else never made any motion to charge any of it off of that. I knew that this report would be published in the Bay City paper, and would be accepted as it was intended to be accepted by the people as reflecting the true condition of the Old Second National Bank at the date mentioned in the report. The report was a true copy of the books, and I attested it, believing it to be true. My attestation was to the fact that the amount of loans and discounts stated in the statement were actually in the possession of the bank, and that the amount of cash was in the bank.

238 Q. If you knew that fifty per cent. of the cash was counterfeited bills, would you have submitted that statement?

Objected to as improper.

A. In that case, I would say it was not a truthful statement, and if fifty per cent. of the loans and discounts were bad, I would not regard it as a true statement, but I didn't sign the statement with the knowledge that it was not true. I signed it, because it was universally the understanding on the board that the statement was true, and it didn't make any difference whether Mr. McGraw signed or any other member of the board. It was believed by the board to be right, and any one of them would have signed it. We all stood together on that proposition,—all united.

Q. Now I am confining this to you; I am asking whether at the time you signed that statement in February, 1903, you did not then know that the Maltby line as carried on the books of the bank was not good?

A. I cannot say that it was not good. I signed that statement with the understanding that I had with the entire board that we would all do the same thing, believing that this thing would work out all right.

Q. Was that discussed and talked over by the board?

A. Yes, sir, time and time again.

Q. And the thought was you would finally work out the Maltby situation in some way, and you would go on signing statements just the same, letting them go out to the public—

A. We believed it would work out all right—the Maltby paper.

Q. You knew it was not good?

A. No, sir, we didn't know.

Q. Why didn't the members of the board put in their own papers for the purpose of making it good and holding it good—Was that ever talked of?

Objected to.

A. No, no.

Mr. T. A. E. Weadock: I move to strike out both the question and statement as incompetent.

The Court: He said it was not talked about.

Mr. John Weadock: I will withdraw if he says it was not talked about. You made these statements of April 9th in the same way?

A. Yes, sir, the same way, in fact, all kinds of them. The statement reflected the condition of the bank just as the February statement did, and the same is true of the other statements signed during the year. I listed my stock in the Old Second National for sale in

October, 1903. I listed it with Mr. Clift. I don't know
239 when my wife listed her stock. She had six shares, and she sold three. I don't remember whether I listed my wife's stock with Mr. Clift. I did not hear Mr. Clift's testimony.

Q. What stock did you list with Mr. Clift for sale?

Objected to as immaterial except his own; overruled; exception for the defendant.

A. I listed twenty-five shares of my own, and I don't know how many shares belonging to Aaron Chesbrough, and three others shares of Mrs. McGraw; that was all. When I listed the stock with Mr. Clift, I was not in his office five minutes; I didn't say a word about the stock, such as 'it would not appear good for a director of the Old Second National Bank to be selling their stock.' My wife's name is "Elizabeth." The first three shares of her stock were sold on April 15th, 1903, by Mr. Clift. It was about this time when I listed it with Clift. My wife sold the stock, because she needed the funds, and I did not say that my wife sold her stock, because I was going to be removed from the board. The only reason my wife sold that stock was because she needed the money and she only sold half of it.

Q. Did she only offer half of it or did she offer it all?

A. No, she wanted to sell her stock and I said I would not do it and she sold half of it. I don't know to this day who got my original stock. I sold it October 30, 1903.

Q. Why did you sell your stock?

A. Because I needed the funds.

Q. Is that the only reason?

A. Yes, sir.

Q. Why,—haven't you testified that you sold your stock because you thought you were going to be dropped off the board?

A. That is understood. I didn't testify to that.

Q. What is the reason you now testify the only reason you sold the stock was because you needed the funds?

A. I will withdraw that. I needed the funds and I sold that stock because I understood I was going to be dropped off the board. Those are the two reasons I sold the stock. Thirty or sixty days prior to that time I told Mr. Curtis that I had sold my stock, or was going to sell it. That would be August 1903. That is my best recollection. It was prior to the sale of my own. Mr. Curtis represented my sister who was his wife. I said I understand they are going to dismiss me from the board, and I am going to sell half my stock. They said as long as you do not benefit—we have some securities we have bought through you and you are going to be off the

board and we will sell our stock if you are not going to be there to represent us. That is the truthful conversation that took place between Mr. Curtis and myself, and never at any time did I advise them to sell. Immediately thereafter they did sell their stock. I didn't know when they did sell it, but I knew shortly afterwards they had sold. I did not inquire whether or not they had
240 sold it but I found out from the certificate books of the bank, which I was looking over, for the purpose of seeing how many had been induced to vote against me at the election, I found the stock had been sold.

Q. How did you come to get the Aaron Chesbrough stock into your possession?

A. I think he wrote me a letter.

Objected to; overruled; exception for the defendant.
Witness resumes:

I didn't do anything with the Aaron Chesbrough stock. He sent it directly to Mr. Andrews. Mr. Chesbrough, I think, wrote me a letter that it was with Mr. Andrews. I don't think I acknowledged the letter he wrote me. I don't keep letters over three or four years. I have destroyed lots of letters in the last fifteen months. I usually clean house every three months, and in the process of cleaning house this letter from Mr. Chesbrough has been destroyed or burned. I listed that stock with Mr. Clift. At the time I listed that stock with Mr. Clift, I did not have possession of the certificates of stock and did not turn them over. At the time I turned over my wife's certificates of stock to sell, I cannot recall whether or not I turned over the certificates to Mr. Clift.

Q. Don't you know you didn't? Don't you know you didn't turn over the certificates of your wife's stock for three shares to Mr. Clift at the time you put them up with Mr. Clift for sale?

A. No, sir, I could not positively say relative to that stock, but with regard to Chesbrough, I did not. I did not sell any stock to Mr. Ames, nor did I ever sell any through him, for myself or anyone else. My stock was sold all through Mr. Clift. When I sold my own stock, I followed the same rule of not delivering the certificates. I did not give any reason why I did not want to deliver the certificates to Mr. Clift. I knew at the time the stock could be sold by simply making an endorsement on the back, and handing over the certificate without going near the bank, and I knew delivery was one of the ways in which the stock was bought and sold. You have got to endorse your name, and that makes it negotiable, like a promissory note, in that respect. I knew that, and yet I did not deliver my certificates, I simply arranged so that if anybody bought my stock, they could go to the bank and my certificate would be cancelled, and a new certificate would be issued, and in that transaction, it would not develop that it was my stock. The purpose certainly was not that it would not develop that it was not my stock. I was perfectly willing that everybody should know that I, a director of that bank, was selling the stock of the bank.

Q. Did you believe at the time you attested this statement that

was to be published in the Tribune in April, that the entire Maltby line was good?

241 Objected to as incompetent, and because it has been gone over several times; overruled; exception for defendant.

A. I have already said that I believed it was good to a certain degree.

Q. I am not asking what you said.

A. That is what I say now. I believed it to be good to a certain degree.

Q. Did you believe that the entire line was good when you signed that statement of June 1903?

A. To a certain degree.

Q. Did you believe that the entire line was good when you signed the statement of April 9?

A. The same answer.

Q. Did you believe the entire line was good when you signed the statement of Sept. 17?

A. The same answer.

Q. Well, you continued as a director during the year 1904, did you not?

Objected to as immaterial; overruled; exception for the defendant.

A. Yes, sir. So far as my continuing signing statements for the entire year of 1904, that shows for itself.

Q. You do know this entire line of Maltby paper was carried at its face in the bank, during the entire year of 1904?

A. If it was not any of it charged off, it was. I cannot say whether any of it was charged off. I cannot recall positively whether any of it was charged off while I was on the board there.

Q. Well, until it was charged off. It was in 1905, in November or January, 1905, I will say to you as it appears in the testimony of Mr. Andrews—?

A. If that was true, there was none of it charged off.

Q. And during the entire year of 1904, to your knowledge, that paper was carried at its face value in the Loans & Discounts in the Old Second National Bank, and reported to the Comptroller, and a statement to that effect published in the newspapers in Bay City?

Objected to as incompetent; overruled; exception for the defendant.

A. Yes, sir.

Q. And all of that time was that paper good?

A. To a certain degree.

Q. Didn't you know in 1904 that paper was bad?

A. I didn't know that it was all bad.

Q. Didn't you believe it was bad?

A. Some of it, to a certain degree.

Q. Didn't you believe that more than 50% would be a loss to the bank?

A. No, I did not.

Q. Did you believe that 40% of it would be a loss to the bank?

A. No.

Q. What part of it did you believe was bad?

242 A. I believed there might be a small loss in the Maltby paper.

Q. How much?

A. That never entered my head. As we talked it over on the board, I thought we might meet with a slight loss.

Q. Did you consider how much the loss would be?

A. No, sir, I never made figures.

Q. Is it your position now that, during the entire year of 1902 and 1903 and 1904 you honestly believed the entire line of Maltby paper was good?

A. To a certain degree.

Q. But you cannot say what that degree was?

A. No, sir, I knew it was questionable, some of it.

Q. You knew it was bad to a degree?

A. I would not say bad.

Q. You knew it was uncollectible to a degree?

A. Yes, parts of it.

Q. You won't say what that degree was?

A. No, sir, I will not. All of the directors of this bank were men of responsibility.

Q. You said in your direct examination that paper on which interest was paid was live paper?

A. Yes, sir.

Q. Is such paper, because interest was paid upon it, good paper?

A. That depends upon the promptness of interest.

Q. And it is solely a matter of the payment of the interest?

A. That constitutes live paper.

Q. Is it good paper simply because interest is kept paid upon it?

A. I would consider it so.

Q. Then, if the interest had been kept paid on this paper that had been charged off, it would still be good paper?

A. If the interest was kept paid, I would consider it live and good.

Redirect examination.

By T. A. E. Weadock:

I have dealt in Old Second National Bank stock buying and selling it for five or six years, and may be longer. The directors held their meeting at eleven o'clock in the forenoon, but they, also, had other meetings in the afternoon and in the evening. The meetings lasted usually about an hour. The conversation, on the street, with the directors after the meeting, that I referred to before, took place about noon time while on my way home to lunch, and when the meeting was held in the afternoon, they were adjourned about six o'clock, after which I walked up Center Street home to dinner. It was at this time that we often spoke of these matters, but not all the time. I understood that the railroad people would not accept the drafts upon them.

243 I could not say now whether the discounts up to October 12th, 1903, were approved at the regular meeting held on that day. The minutes of that meeting read, "Discounts read to date," and from that I can't tell whether they were approved or not. The discounts were read at the meeting from the discount register. The actual papers were never before the board, Mr. A. J. Cook was secretary before me. On October 3rd, 1902, the regular meeting of the board was held at 11:30 A. M. "Present—J. W. McGraw, Chesbrough, Cook, Capt. Davidson and James E. Davidson. Minutes of last meeting read and approved. Discounts to date, read and approved. Adjourned. A. J. Cook, Secretary."

The minutes of that meeting read that way. This was the same day the national bank examiner was there, and I think he was at the meeting. The next meeting was October 10th, 1902, but a quorum was not present, and it was adjourned. The minutes of the meeting of November 21st, 1902, makes no reference to Maltby's presence before the board. The meeting at which he was present was not held in the Ridotto. I don't recall the date of the Ridotto meeting, but the occasion of it was to discuss the Maltby paper. I can't recall the year or the month.

Mr. John Weadock: That was 1904.

Mr. T. A. E. Weadock: Then, that is out.

Court: When was it you went to look at this property in the woods, the lumber and forest products?

A. It was right after Maltby had furnished us with a statement, and within ten days after that date, whenever that date was, and I made my report immediately upon my return to the bank. I had been gone ten days or two weeks. The letters of 1898, 1899, 1900, 1901, and 1902 were brought before the board, and I heard them read. There were no other letters besides these that I recall, nor were there other letters from other parties with reference to the same transaction, and of the same tenor. I think my report to the board was typewritten.

Q. (Showing witness Exhibit 223:) Is that the report you made to the board on that subject?

A. That I believe to be my report. The report is typewritten, and was prepared under my direction. I don't think my signature appears, but I think that is my statement, and this is the report I read to the board, and handed in.

Received in evidence without objection.

Exhibit 223 read to the jury, as follows:

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DEFENDANT'S EXHIBIT 223.

McGraw Report.

Recapitulation of Stock at Different Points Belonging to Maltby Lumber Company.

	Maltby est.	Our est.
Boyne Falls	\$30,250	11,714.75
Hard Luck	51,160	36,860.35
West Bay City	11,630	6,994.50
McGraw Branch	30,680	14,055.85
Cornwall Branch	7,050	3,714.64
Moore's Siding	11,500	2,087.00
Geel's Siding	2,100	2,599.44
Pineconning	9,560	13,844.84
	<hr/>	<hr/>
	153,930	91,871.37
Detroit	22,600	22,096.60
	<hr/>	<hr/>
	176,530.00	113,967.97
Less 10390 Cedar Posts A. T. & T. Co.		18,387.50
	<hr/>	<hr/>
	176,530.00	95,580.47

Not Examined.

Muskegon	707.50
North Cameron	4,070.00
Manistee River	8,850.00
Temple	4,250.00
Scattered lots on D. & M.	3,900.00
Clear Lake Branch	2,900.00
Cameron Branch	2,750.00
D. & M. R. R. & Alpena, Nov.	6,750.00
Scattered lots on Mac. Div.	5,500.00
	<hr/>
	39,677.50

(The nine items and the footings under the heading "not examined" are on a separate slip of paper pinned on the bottom of the first page.

Forest Products Found at Boyne Falls.

1728 poles (25 to 60 ft. long) marked A. T. T. Co.
 1054 poles (20 to 60 ft. long).
 2640 posts.
 40 cords shingle bolts.

What ties in yard are marked up and sold to Grand Rapids & Indiana Railroad, and the money has been advanced.

There are also 900 #1 ties loaded this day on cars. N. Y. Central #121014 and B. & O. #64482.

Walker Siding.

336 Extra XAX shingles.

60M C. B. Shingles

245 Alanson.

252 M Extra XAX Shingles.

167 M C. B. Shingles.

214 M S. B. Shingles.

880 poles (20 to 50 ft. long).

57 poles T. & T. Co.

Maltbys.

15 M C. B. Shingles.

31 M S. B. Shingles.

50 poles (25 to 50 ft. long).

Clarion.

1 M Posts.

A few poles at Clarion not inspected.

Conway.

1900 Posts.

Bogardus Branch.

2500 Posts.

Wheeling.

1000 Posts.

There are Forest Products in Crooked Lake, which did not examine, it being in the water and could not arrive at quality and amount, but are supposed to contain about 1 M #1 Cedar ties and 500 M #2 ties.

Norwood.

1900 #1 ties.

600 #2 ties.

Recapitulation.

1785 marked up to A. T. & T. Co.....		
1075 Shingles at \$1.75.....	1,881.25	
4769 poles at \$1.50.....	7,153.50	
1000 ties at 35 cts.....	350.	
9000 posts at 07 cts.....	630.	
40 cords of shingle bolts at \$2.50.....	100.	\$10,114.75
4 M Cedar Ties in Crooked Lake & Norwood at 40...	1,600.	
Total		\$11,714.75

Inventory of Cedar in West Bay City Owned by Mr. Maltby.

#1 Ties 870 pcs. at .35	304.50
#2 Ties 25 M " .25	6,250.
Posts 5 M " .07	350.
Telegraph Poles 50 at .60.....	30.
5 in. by 20 ft.	
Shingle Ties 600 pcs. at 10c.....	60.
	<hr/>
	\$6,994.50

246 The majority of #2 Ties as inspected is on account of a number of them not being long enough for #1 and also not thick enough and not of sufficient face. These mistakes in regard to the length were made in the woods, and ought not to have been shipped down to the yard.

That is true of a great many of the shingle ties. They should have been left in the woods also.

In regard to the timber in these ties, they are a sound lot.

Forest Products at Tom Moore's Camp on Hard Luck Division.

Round Cedar 8 ft. long.....	13,195 pcs.
Cedar Posts	19,400 "
Mfg. Cedar Ties.....	2,450 "
Poles	1,350 "
Cedar Shingles	596 M
White Pine	11 M
White Pine Shingle Logs.....	500 M

Received information from the foreman that there were ten thousand pieces of Posts and Round Cedar scattered in the woods and about 500 poles.

Hard Luck Camp.

Posts	14,875 pcs.
Round Cedar 8 ft. long.....	11,175 "
Mfg. Ties	3,855 "
Cedar Poles	12
Shingles	943 M
Logs.—Maple, Tamarack, Hemlock	
Ash, Elm and a few white pine...	350 M

The contractor informs me that Mr. Maltby purchased all the timber on Sections 1 and 2 which the above logs came from this description, also states that there is about 300 pieces of logs in the woods.

The "Y" or Coles Mill.

Mfg. Ties	10,625 pcs.
Round Cedar 8 ft. long.....	14,000 "
Shingles	735 M
Telegraph poles	70 M
Cedar Posts	8,255 M

Round Cedar 8 ft. long sorted to be manufactured into shingle bolts, 38 inches, will make about 4,000 cords.

Mr. Cole thinks there are several thousand pieces in the woods.

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Recapitulation.

Cedar Posts	43,530	pcs at 7c	2,977.10
Cedar Round	28,370	" " 30c	8,511.10
Mfg. Ties	16,930	" " 35c	5,925.50
Poles	1,432	1.50	2,148.
Shingles	2,285	M 1.75	3,998.75
White Pine Shingle Logs.....	500	M " 5.00	2,500.
Mixed Logs	350	M " 8.00	2,800.
Cedar Shingle Timber	4,000	Cds " 2.00	8,000.
			<hr/>
			36,860.35

40,000 pieces scattered in woods.

Inventory at Moore's Siding.

1 M Cedar Ties $\frac{1}{2}$ #twos at .22 $\frac{1}{2}$	225.
4400 " Posts at .08	352.
1210 " Poles (high price) at 1.00.....	1210.
50 M Tam. & Hemlock (sold to M P Co.) 6.00.....	300.
<hr/>	
1 M pcs to be converted into Poles and ties.....	2,087.00

Geel's Siding.

384 Cedar Ties #1 at .35.....	234.40
884 " " #2 at .25	221.
350 " Poles (high price) 1.00	350.
9963 " Posts at .08	797.04
152 M Tam & Hemlock (sold to MP Co) 6.00.....	912.
34 Cds Shingle Bolts at 2:50	85.00
<hr/>	
2599.44	

Pinconning.

5318 Cedar Posts at .08	425.44
12056 " Ties 75% #2 .27 $\frac{1}{2}$	3315.40
3 M " Poles Am T & T Co. at 1.50	4500.
3688 " Poles (high price) at 1.50	5532.
180 ps. Oak Ties at 40c.....	72.
4 cars poles not unloaded 453 pcs.	
1200 Cedar Ties #2 on cars.	
<hr/>	
13844.84	

McGraw Branch.

Shipped		
12 M 20,151 pcs Cedar Ties.... at .35	7,052.85	
15 M 65 M Posts	at .08	5,200.
1803 pcs Poles	at 1.00	1,803.
<hr/>		\$14,055.85

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Cornwall Branch.

On branch	1505 Poles at 1.50	2,257.50
174	2087 Ties at .35	730.45
1669	1207 Posts at .08	96.56
		<hr/>
		3,084.51
1711 Ties on bank	..... at .30	513.30
1669 Posts " "	..... at .07	116.83
		<hr/>
		3,714.64

McGraw Branch.

Shipped		
12 M	20,151 pcs Cedar Ties	..... at .35 \$7052.85
15 M	65 M Posts	..... " .08 5200.00
	1803 pcs Poles	..... " 1.00 1803.00
		<hr/>
		14055.85

Included in the above statement is the following trespass claim.

7500 Cedar Ties largely #1	} Amounting to \$4425.00
1000 Cedar Poles	
10,000 Cedar Posts	

Cornwall Branch.

On Branch	1505 Poles	.....at 1.50	\$2257.50
174	2087 Ties	.....at .35	730.45
1669	1207 Posts	.....at .08	96.56
			<hr/>
			\$3084.51
1711 Ties on bank at .30	.....	513.30	
1669 Posts on bank at .07	.....	116.83	630.13
			<hr/>
			\$3714.64

Inventory of Stock at Detroit, Michigan.

5605 Cedar Poles marked A. T. T. Co.	.....at \$2.00	\$11,210.00
5203 " "	....." 2.00	10,406.00
126 " Ties #2	....." .30	37.80
720 Cull Cedar Ties	....." .15	108.00
1760 Cedar Posts 8 ft. long	....." .15	264.00
177 Cedar " 10 ft. long	....." .40	70.80
		<hr/>
		\$22,096.60

There are six cars being loaded with American T & T Poles numbered as follows:

249 M C 4281
 M C 4017
 N Y C 30932
 N Y C 28454
 N Y C 30586
 N Y C 28126

There are 250 inferior poles due to rot and crook. One car load of Cedar Blts.

The cedar bolts referred to here are almost a cull.

Q. I find a date on the corner of this paper, 4/20/04, what does that mean?

A. I don't know the significance of that. My best recollection of the date I submitted that to the Board, is about two weeks after Mr. Maltby made his statement to the Board. At the time I read this report to the board, I couldn't say now whether or not Mr. Chesbrough was present. If I did know of his being in Chicago that winter, I have forgotten it. From the time this property was taken over from Mr. Maltby, we were shipping right along. We were shipping these products right along.

Q. And in fixing these prices, were these the same prices that were in the Maltby inventory, that you have put on the goods?

A. We put in the prices according to his contracts. In fixing the prices of these different forest products, we were guided by the contract price that he receives for these goods.

Q. Why do you say they are different between the Maltby estimate and our estimate?

A. I wanted to be as safe as I could in my estimate. I might not make quite so much of a No. 1 tie as he did.

Q. If you took the price from the contract, how would there be any difference between the Maltby estimate and your estimate?

A. I might not find it the exact amount they had on hand and handed in to the bank; in other cases I found more. So far as I set down the prices in this statement, I took that from the Maltby contracts. I think he had contracts in writing with all these different people. I don't know where they are.

Q. (To Mr. Andrews.) Have you the contracts?

Mr. Andrews: I have not.

Q. (To the witness:) Was your attention called to one of the contracts which Mr. Maltby had with the Flint & Pere Marquette Railroad Company?

A. I cannot recall any special contract, no, sir.

If there was any contract between the Maltby Lumber Company and the Flint & Pere Marquette R. R. Co., I presume I did see it at that time. Mr. Maltby was shipping materials in the year 1902 before he made his statement to the bank. His business was going on, and it was a large business, and it is my recollection that he paid the bank from \$25,000,000 to \$30,000.00 a year in interest.

Recross-examination.

By John C. Weadock:

Q. Just look over that paper and see in what instances you found more than there was given in the Maltby inventory? (Handing witness Exhibit No. 223.)

Objected to as incompetent, as that shipping had been going on between the time Mr. Maltby submitted his inventory, and Mr. McGraw made his inventory.

Overruled. Exception for the defendant.

A. The Maltby estimate of \$2100.00; our estimate \$2,599.44. Another item is where the Maltby estimate shows \$9,560.00, and our estimate shows \$13,844.84; the difference being \$4,284.84.

Q. Now, as a matter of fact, aren't there \$4500 worth of material in the Pinconning Yard marked up to the American Telephone & Telegraph Co., and actually sold and paid for, and does not that explain the difference?

A. That is not my understanding of it,—when I handed in this statement.

Q. I show you an item on the next to the last page of this inventory which refers to poles belonging to the American T. & T. Co. at Pinconning, and the totals amount to \$4500, which should be deducted in your own estimate.

A. Now, as to that,—as to that being conducted—I don't think it was embodied in my recapitulation of the other items. I think that was treated separately.

Q. Do you say it was?

A. I cannot say now.

Q. Is it not apparent on the face of the paper?

A. That may be true, but I was careful when I recapitulated my work to have it accurate.

Q. Is it not apparent on the face of the paper you deducted that material at Pinconning from the estimate of the value, and does not that appear on the face of the paper?

A. I cannot say.

Q. And is it not included in the deductions amounting to over \$18,000?

A. I cannot say. When I made up that statement I believed it to be accurate.

Q. Nobody is questioning that point at this time. I call your attention again to the writing on the first page where it says, less 10390 Cedar Posts A. T. & T. Co., \$18,387.50?

A. Well, I don't know now what that was.

Q. That \$18,000 was deducted from your estimate up here, was it not?

A. Yes, sir.

Q. And that included the poles that are marked up to the A. T. & T. Co.

A. Yes, sir, that is right.

251 Q. And it also included in addition to that, \$11,000 of the same kind of poles in the Detroit yard, did it not?

A. If it says so, it does.

Q. Is it not a fact there remains but one place where you found that the product on hand was more than the amount mentioned in the Maltby inventory, namely, at Geel's Siding.

Objected to, as the paper speaks for itself. Overruled. Exception.

A. I cannot say as to the other amount. That might have been separate entirely.

Q. In this Exhibit 223, when this was shown to the board, you explained it fully to the board?

A. The entire board was there we went over it.

Q. You explained it fully?

A. I tried to.

Q. You didn't withhold anything from them?

A. I was sent to ascertain the facts. I got them as well as I could, and submitted them to the entire board.

Q. Reported it fully?

A. Certainly, as far as I could.

Redirect examination.

By Mr. T. A. E. Weadock:

Q. You say the entire board; was Mr. Chesbrough there at that meeting?

A. Well, I meant to the board; I cannot say every man was there. Whoever was there, I made the explanation to.

Recross-examination.

By Mr. John Weadock:

Q. If there were any members of the board that did not happen to be at that meeting you met them afterwards, and you discussed the matter with them, did you not?

A. I cannot say I did. But they had access to that paper. I cannot say as I did. I don't know but what the entire board was there.

Q. Don't you know that either from the report made at that time or from the discussions made afterwards, that all the members of the board, including Mr. Frank Chesbrough, knew as much about that report as you did?

A. I cannot say that. I cannot recollect.

Q. You had to do with that matter; you were reporting yourself to these gentlemen; what is your best recollection as to whether or not you reported to all the members of the board?

A. I thought they were there. I cannot say that Mr. Frank Chesbrough was there or was not, or that afterwards I ever said anything to him about that estimate.

Q. Was not the amount you found discussed at other meetings than the first one?

A. No, I don't remember that it was.

252 Q. Was not this shortage you found discussed?

A. No, I think that was taken up at that meeting, and I

don't think it was talked of much afterwards. I think C. L. Collins was at that meeting. He attended about half a dozen meetings on request in 1902. At present I cannot give you the date of the meeting at which I read this report to the board but it was about two weeks after Mr. Maltby had shown the board his statement of the amount of forest products.

Q. Then if that was about Nov. 21st, it would be early in December that the report was presented?

A. Yes, sir, about the middle. That is the best of my recollection.

Exhibits Nos. 122, 123, and 124 were received and read in evidence without objection.

Q. Will you read the endorsement to show whether or not they were recorded or filed?

A. They were not.

Mr. Humphrey: They didn't have to be, because the bank was in possession of the property through Mr. Lewis, and did not need to record or file them.

MR. MARTIN M. ANDREWS (recalled).

Examined by the Court:

These drafts were always carried as assets in the accounts of the Maltby Lumber Company, and later in the accounts of the Maltby Cedar Company, when that company succeeded the former. They were carried with the notes of the bank, and as assets of the bank. The rate of interest varied. I think he paid seven percent. on his first business for a long time, but there was nothing in writing to show that.

Mr. Clark: We admit that on August 2nd, 1904, the whole line of the Maltby Lumber Company's paper was put into the paper of the Maltby Cedar Company, and that the Maltby Cedar Company, with the exception of Mr. Maltby, were the directors of the Old Second National Bank.

Exhibit "V" of the former trial, I understand, is the land book of the Maltby Lumber Company. (Exhibit referred to marked No. 224.) Since the last trial it has always been in the possession of Mr. Lewis, except for a few weeks, during which it was sent south at your request. It was received back on November 15th of this year and has since been in the vault of the Old Second National Bank.

Q. I ask you for some other letters which were read on the former hearing with reference to the acceptance of papers coming from different parties, the same kind of letters as these in 1898, 1899, and 1900?

A. I don't appear to have any more of these.

Q. There were about a dozen letters running, I think, from M to M and I think they were dated prior to October, 1892.

A. Perhaps.

(Recess 10 minutes.)

Q. I have been asking you about some letters that were marked Exhibits G to M inclusive on the former hearing. I wish to ask you now whether you have been able to find those letters.

A. I have not, I cannot find that they are in the papers, and I am not aware that the papers had been separated from the original package.

Q. State what was done with the letters relating to acceptances by the different companies, and the assignment of Maltby and of the Maltby Lumber Company, and the promise to pay that amount to the bank after these accounts had been closed and the amounts paid.

A. When an account was closed and paid up, I separated those from the other letters, in order to keep a better track of them, and put them in different files.

Q. What was done with those letters?

A. They were kept. I have those here, I think all we ever had. I have, also, some additional letters along this line that I did not have the other day, and which I produce now. (Witness produces papers.) This bundle I am handing you came from the files of the bank, whose custom is to file away all their letters and papers. We have never destroyed any, although our attorney has advised us to destroy them after seven or eight years, but we have never destroyed any letters in connection with the Maltby Company. (Letters marked Exhibits 225 to 238 inclusive.) Exhibit 225 offered and received in evidence.

Mr. Clark: We take the position of making no objection as to the history of the transaction, but we object to them as substantive evidence of the good faith of the defendant.

Mr. T. A. E. Weadock: I take exception to that statement.

(Exhibits Nos. 225, 226 and 227 read in evidence.) Exhibit No. 228 is a contract with the Maltby Lumber Company, but it don't belong with those papers. My recollection is that was a limited and short account which ran out before all accounts were assigned to the bank. Offered and received in evidence. Exhibits Nos. 228 to 238 read in evidence.

254a Exhibit 228 was a guaranty by John Winters, F. C. Andrews and Oliver H. Lau of the account of the Detroit Construction Company, Limited, with the Maltby Lumber Company for all material delivered to the Construction Company by the Maltby Lumber Company. Dated Dec. 7, 1900.

Exhibit 229 was an order to the Toledo & Western Railway Company, of Toledo, Ohio, dated March 25th, 1901, to pay to the Old Second National Bank, of Bay City, Mich., all funds due to the Maltby Lumber Company for material furnished, until notified by the bank to discontinue. It was signed "Maltby Lumber Company," and accepted in writing by the Toledo & Western Railway Company; so far as the same applied to two contracts, one for 50,000 cedar ties, and one for 3,000 cedar poles.

Exhibit 230 was a letter of the Maltby Lumber Company to the Old Second National Bank, dated January 5th, 1901, asking it to

instruct its correspondent at Detroit to accept from the Detroit Construction Company freight bills as payment on drafts.

Exhibit 231, dated Bay City, Mich., January 31st, 1902, addressed to A. E. Peters, Purchasing Agent, Detroit United Railway—"Please pay to the old Second National Bank, Bay City, Mich., all funds due or that may become due the Maltby Lumber Company on all material furnished the Detroit United Railway Company by them until notified by the Old Second National Bank to discontinue such remittances to it.

"MALTBY LUMBER COMPANY."

"We will comply with the above order.

DETROIT UNITED RAILWAY,
A. E. PETERS, *Ass't Secretary.*"

Exhibit 232 was the same order in form, dated April 22nd, 1902, to the Milwaukee Electric Railway & Light Company, Milwaukee, Wisconsin, and signed by that company by John T. Beggs, President and General Manager.

Exhibit 233, dated Bay City, Mich., October 24th, 1902, addressed to the South Bend & Southern Michigan Railway Company, South Bend, Ind., was the same order in form signed by the Maltby Lumber Company.

"We will comply with the above order.

F. W. BUELTZINGSLOWEN, *Treasurer.*"

254b Exhibit 234, dated Bay City, Mich., October 2nd, 1902, addressed to J. W. Griffith, Purchasing Agent, Union Pacific Railway Company, Omaha, Nebra., the same order in form signed by the Maltby Lumber Company.

"We will comply with the above order.

J. W. GRIFFITH,
Purchasing Agent."

Exhibit 235, dated Bay City, Mich., September 4th, 1902, addressed to the Lane Construction Company, Jamestown, N. Y., the same order in form signed Maltby Lumber Company.

"We will comply with the above order.

LANE CONSTRUCTION COMPANY,
By G. B. LANE, *General Manager.*"

Exhibit 236, dated Bay City, Mich., August 20th, 1902, addressed to J. B. McCance, Secretary and Auditor, Indiana Railway Company, South Bend, Indiana, the same order in form signed by the Maltby Lumber Company.

"We will comply with the above.

INDIANA RAILWAY COMPANY.
J. B. McCANCE, *Treasurer.*"

Exhibit 237, dated June 5th, 1902, addressed to Valley Telephone Company, Warren, Arkansas, the same order in form signed by the Maltby Lumber Company.

"We will comply with the above order.

VALLEY TELEPHONE COMPANY."

Exhibit 238, dated Bay City, Mich., May 11th, 1903, addressed to the Detroit United Railway, Detroit, Mich., the same order in form signed by the Maltby Lumber Company.

"We will comply with the above order.

DETROIT UNITED RAILWAY,
By A. E. PETERS, *Ass't Secty.*"

These are all the letters I have upon this subject. My recollection is that all these letters and subjects were kept separate at the time. The letters relating to that part of the business which was closed up, and also, the amount paid were not put in a different place, except this line of letters that I recall now. The others were filed away, and I will produce them in court later. I will have to look through the letters received by the bank during two years, but I don't think we have any more of this particular line of letters.

Examination.

By Mr. Clark:

So far as I know these letters that have been read, are all the letters of that nature the bank ever received. Not one of the railroads mentioned in this last bunch of letters, except a few were those on which the bank suffered a loss. The loss the bank suffered was on the paper of six companies. The A. T. & T. Company; the C. M. & St. P., G. R. & I.; The Grand Trunk Railway Company; the Michigan Central Railway Company, and the Western Union Telegraph Company, isn't that right?

Objected to. Overruled. Exception for the defendant.

A. Yes. That is a list of the roads on which we made a loss.

Examination.

By T. A. E. Weadock:

Q. Now, Mr. Andrews, state whether or not any loss was made in this Maltby Lumber Co. matter by reason of the fact that any of the companies or individuals that the Maltby Lumber Co. had sold material to, had not accepted the drafts upon them or the assignments made by Maltby to the bank?

Objected to as leading and argumentative, and calling for a conclusion.

The Court: I will permit you to show just how the business was conducted, but this question calls for a conclusion. I sustain the objection.

Exception for the defendant.

Q. Did the bank lose any money on account of the indebtedness of The Maltby Lumber Company, to-wit: by reason of the fact that the drafts were not forwarded for acceptance?

Objected to as calling for a conclusion. Sustained.

Q. What did happen, did the bank lose in any case, by reason of the fact that the drafts had not been forwarded for acceptance by the company, and the business being done in the other way, by the acceptance on the part of the company of the assignment of the Maltby Lumber Company to the bank of all the material furnished by the Maltby Lumber Company to these different companies, and assigned by that company to the bank?

255 Q. I am not asking for what would have happened, but what actually did happen. I am proving a negative. I will let your Honor ask the question if your Honor has in mind a different form; a different question that might be asked on that subject.

The Court: As I understand the question, it amounts to this: Would the situation have been any different had the drafts been accepted?

Mr. T. A. E. Weadock: No, I don't think I have made myself clear; my point is: If the drafts had been forwarded for acceptance, and had been accepted and paid, there would have been no loss on those drafts.

Now, the drafts were not forwarded for acceptance, because these different companies would not accept drafts; that was not their way of doing business, but the only amount that would be collected from the Lumber Company would be the amount due from these different companies to Maltby, that were assigned to the bank, and that assignment was made good by the assignment of these different companies. Now, my question is, whether in any case any money was lost to the bank, because the drafts were not forwarded. Or, in other words, what they actually did do after the transaction as it worked out, all the money that was due from these different parties to the Maltby Lumber Company, was paid to the bank after the assignment.

You may ask whether they lost anything on the material actually delivered to Maltby.

By Mr. Humphrey:

Q. Where the material was delivered by Maltby to these companies, did the bank lose anything on account of the drafts not being accepted?

Mr. John Weadock: On account of the drafts not being accepted, that is objectionable.

The Court: Yes, you should put that in, whether they lost anything at all, where the stuff was delivered.

Mr. Clark: Must they not first show that the witness knows. How does he know whether the money all came to the bank, or whether it went to the Maltby's office?

The Court: If he does not know, he must say so.

256 Mr. T. A. E. Weadock: I will leave it to the court to put the question which he wishes me to ask.

The Court: Did the bank lose anything, on stock actually shipped

by Mr. Maltby by purchasers on any account that had been assigned to the bank by Maltby?

T. A. E. Weadock & J. C. Weadock: I am content with that.

A. I believe it did not.

By Mr. Clark:

Q. Do you know how many of these accounts were paid direct to the Maltby Lumber Company in spite of these letters?

A. I don't know. I don't know that all were paid that way but I believe they were paid to the bank.

Q. Do you pretend to know, Mr. Andrews, whether or not all the property shipped and sold by Maltby, was paid for to the bank as distinguished from Maltby?

A. I don't think all the remittances came direct to the bank. It was the custom of the A. T. & T. Company, I think, to remit to Mr. Maltby, but I don't know how much came to the bank, and how much to Maltby. And of the amounts that went to Maltby, I don't know positively whether he brought it all to the bank or not, and if the bank had the bill of lading for that shipment, and they paid direct to Maltby and he kept the money, that would be a loss to the bank, but I don't know of any such instance.

Mr. T. A. E. Weadock: I want to call the attention of the jury to the fact that at the meetings of July 3rd and July 10th both Mr. McGraw and Mr. Chesbrough were absent, according to the directors' minutes. I want to call the court's attention to the fact that at none of these meetings from July 3rd, 10th, 17th, 24th and 31st, August 8th, 14th, 21st and 28th, was either McGraw or Chesbrough present. I will withdraw Exhibit 126, and offer Exhibit 125, dated May 7th, 1903. (Reading Exhibit 125 to the jury.)

Mr. T. A. E. Weadock: I offer in evidence Exhibit 127, being the deed made the 7th day of May in the year 1903.

There is no question but what all these deeds were handed me by Mr. Andrews and all in the possession of the bank.

Mr. Clark: Absolutely none.

Mr. T. A. E. Weadock: Also Exhibit 128; also Exhibit- 129 and 130.

Mr. John Weadock: These instruments are all recorded in the book of deeds, and not mortgages, that is true of all of them is it not?

257 Mr. T. A. E. Weadock: Yes, what of it? I offer Exhibit 131, deed made the seventh day of May, 1903, also Exhibit- 132, 133, 134 and 135.

JAMES E. DAVIDSON, JR., after being duly sworn on behalf of the defendants, testified as follows:

Examined.

By Mr. T. A. E. Weadock:

I live in Bay City, and my name is James E. Davidson. I have been president of the Old Second National Bank since, I think, January 1st, 1905, succeeding my father, James Davidson, the shipbuilder, in that position. I knew Orrin Bump very intimately for ten or fifteen years, and have lived in Bay City for twenty-five years. I knew Bump from the time he moved to Bay City until the time of his death. Part of the time I lived on Center Street in Bay City, and he lived on Center Street, a block from me, for a great many years. I know Frank P. Chesbrough, J. W. McGraw, and all the other gentlemen who were directors of the Second National Bank in 1902 and 1903. I knew my father the best, and Mr. Bump next, Chesbrough the next best, and McGraw the next best. I, also, knew Mr. Foss and Mr. Cook. That is my signature on Exhibit No. 239.

Mr. T. A. E. Weadock: I offer this report in evidence.

When I signed that report, as one of the three attesting directors of the Second National Bank, it had already been signed and sworn to as correct by M. M. Andrews, the cashier, but I don't know whether McGraw and Cook signed it before I did or not, although my name is the last signature. Since that circumstance does not indicate anything as to who signed first. That report, viz: the statement of February 6th, 1903, went to the comptroller, and the duplicate was kept in the bank. I had nothing to do with publishing that report in the newspaper. I signed no copy, and had nothing to do with it. This was attended to by Mr. Andrews.

Q. Why did you sign the report to the comptroller of Feb. 6, 1903?

Mr. John Weadock: That is objected to as immaterial.

The Court: Excluded.

Mr. T. A. E. Weadock: Does your Honor hold suit can be brought against two men for not doing certain things, and we cannot then produce a witness showing that he did not do the same thing, and why?

258 The Court: Yes, I do so hold. It is absolutely immaterial.

Mr. T. A. E. Weadock: Haven't we a right to show what the other directors did?

The Court: I permit you to show that.

Mr. T. A. E. Weadock: That is what I am showing.

The Court: I will permit you to show anything that was done in connection with the matter.

Exception.

Q. Before you signed this report, did you examine the affairs of the bank preparatory to signing the report?

Mr. John Weadock: I object to that as immaterial. It is not showing what he did. I can see at once he can get the same information by asking the question in a different way, but I submit the asking of this question shows that he is inquiring of something that is not material to this issue. What these gentlemen may have neglected to do or refrained or omitted to do isn't any part of the issue here.

The Court: The objection is overuled. I will permit them to show what was done, but I will not permit any argument as to why these things were done, and no inference was drawn, from it.

(Question read).

A. No, I did not.

Q. Did you examine the amount of Loans and Discounts in the bank at that date?

A. No, sir, I did not.

Mr. John Weadock: I object.

The Court: You may ask him what he did. I will not permit a negative answer.

T. A. E. Weadock: Note an exception.

Q. Tell us all you did, Mr. Davidson, in signing this report?

A. It is customary to have reports sent to the comptroller of the currency, sworn to either by the president or the cashier, and attested by three directors. If I remember correctly, Mr. Andrews made out the report, and stated that he wanted the directors to sign, and asked me to sign it. Before I signed it, I noticed that it had been sworn to as being a correct report by Mr. Andrews, as cashier. I think the comptroller called for five reports per year.

Exhibit 240, the report of June 9th, 1903, is signed by James Davidson, my father, as president of the bank; that is his signature there. I know the signature of E. B. Foss and his signature is there, also.

Exhibit 222, the report of April 9th, 1903, is signed by E. D. Foss, one of the attesting directors.

Exhibit 241, the report of September 9th, 1903, was signed by James Davidson, J. W. McGraw, and James E. Davidson.

Q. State what you did in reference to the signing of that report, and why you came to sign it?

Mr. John Weadock: That part of the question which asks why he came to sign it is covered by the rulings already made and I object to it as immaterial.

Sustained. Exception for defendants.

— I think myself and my father signed that report at the same time.

Exhibit 242, the report of November 17th, 1903, contains the signature of E. B. Foss, one of the attesting directors.

Exhibit 170, the report of January 11th, 1905, has been signed by myself, and contains my signature; also, the signature of George B. Jennison, and Frank T. Woodworth, directors of the bank at that time.

Exhibit 169, the report of May 29th, 1905, is signed by myself and George B. Jennison, and also, by Frank T. Woodworth, plaintiff in this case. I don't think that Mr. Woodworth made any examination of the affairs at the bank or of the loans and discounts, or other items mentioned in the report of January 11th, 1905, before he signed that report, nor to my knowledge, did he make any such examination before he signed the report of May 29th, 1905. I remember the meeting when Mr. Maltby came before the board with reference to his affairs in the fall of 1902. The meeting was held in the Directors' Room in the Second National Bank, but I don't remember the date of the meeting, or whether Mr. McGraw or Mr. Chesbrough was present, nor whether anything was put on the records about it. The bank had some examinations made after it took the affairs of the Maltby Lumber Company into its own hands, and I think employed a man named Colford to examine the property. A man named Carswell made an examination first, but I can't say whether Mr. McGraw made an examination.

Q. Were you there when he made a report to the board of the examination he made?

A. He may have done so, I don't remember. I don't think Mr. Chesbrough attended the meetings of the Board from October 1902, until the latter part of March, 1903; I think he was away at the time, nor do I remember of Mr. Chesbrough signing the report of 260 February 6th, 1903. I don't think that at any time prior to the date of the last report I signed in 1903 that I ever offered a resolution to the Board of Directors to charge off any of the Maltby Lumber Company paper, nor do I remember of any other director offering *much* a resolution prior to November 17th, 1903.

Q. Do you know why any other director did not offer such a resolution? Why wasn't it charged off before November 17th, 1903? Did Mr. Woodworth ever commence suit against you about this stock?

All objected to. Sustained. Exception for the defendant.

Q. Mr. James Davidson is not here. Is it practicable, on account of Mr. Davidson's hearing, to examine him as a witness in court?

A. It would be almost impossible. He is almost totally deaf.

Mr. John C. Weadock: There is no question about that.

By T. A. E. Weadock:

Q. The questions I have asked you, Mr. Davidson, with reference to the examination you made as to the affairs of the bank before you signed the report of Feb. 6, 1903, and as to any particular item of that report, and every item of the report, state whether your answer to that is the same as it would be to the same question about each report of 1903?

A. It would be. Orrin Bump was considered a good banker. His character was considered good. The employees in the bank during 1902 and 1903, we considered them honest and competent.

Q. Had the directors anything to do with employing or discharg-

ing any bookkeeper or anybody employed in the bank after they had appointed the officers?

A. I don't think they did. The directors elected the president, the cashier, the vice-president, and, I think, the assistant cashier, and all the other employes, officers and agents in the bank were employed by the cashier. When Mr. Bump was cashier of the bank, he ran the bank, to use a common phrase, and after he became president of the bank, Mr. Bump ran the bank. I can not state anything prior to the time I went on the Board. Mr. Bump attended to the discounts for the time I was there.

Q. Did you have anything to do at any time, from first to last, during your connection with the bank, and within the time I have mentioned, with reference to taking in any of this paper of Maltby, in the first place?

A. No, sir, I don't think the directors did.

Q. State whether or not from time to time, you talked with Mr. Bump about the Maltby line?

261 Mr. John Weadock: That is objected to as immaterial and hearsay, any conversation this man had with Mr. Bump.

The Court: Sustained.

Exception for the defendant.

I was interested, I think, in the Maltby Cedar Company. I was not interested in the Maltby Company prior to the time the bank took over the property. I was not interested then as a director in the bank; I had no personal interest in it at any time. Mr. James Davidson had no personal interest in it at any time. None of the directors, so far as I knew, had any personal interest in it; neither do I think they had any personal interest in any of the Maltbys, or that business, prior to November 1st, 1903. I kept one of our accounts in the Second National Bank. Mr. James Davidson kept one of his accounts during 1902 and 1903 in the Second National Bank. Father has his own account there, and I have my own account there. Mr. Edgar B. Foss kept his account in the Second National Bank during 1902 and 1903, and it is a large account. Neither I, nor James Davidson, was interested in any way in the stock of Frank P. Chesbrough or Will McGraw.

Q. What assurance, if any, did Mr. Bump, the president of the bank, give you with reference to the line of the Maltby Lumber Company prior to November 17th, 1903?

Mr. John Weadock: That is objected to as immaterial and hearsay. Sustained. Exception for the defendant.

Q. Did you know of the different letters which Mr. Bump had received from the parties who were sending forest products, agreeing to accept the assignment made by Maltby to the bank?

A. I don't remember of seeing the letters, but I heard of them there. I was informed of them, I think, from Mr. Bump. There may have been discussions in a general way regarding the Maltby line from time to time between Mr. Bump and the directors, from the time or prior to Nov. 17, 1903.

Q. In 1902 and 1903, after the securities had been given to the

bank, after Mr. Lewis, about the first of the year, had been put into the Maltby office—or before that time—did you regard the Maltby line of paper as secured?

Mr. John Weadock: That is objected to as immaterial, leading and suggestive.

Sustained. Exception for the defendant.

Q. What security did the bank have on the 1st of February, 1903, for the Maltby indebtedness?

A. Was that prior to the formation of the Maltby Cedar
262 Company?

Q. Yes.

A. At that time, they had certain bills of lading for cars of lumber products shipped, these being attached to drafts that the money had been advanced on, and I think they had some bank stock, some of Mr. Maltby's bank stock. They did not have very much of his bank stock. He was, to a small amount, formerly a stockholder in the Second National Bank.

Q. Did they have assignments on the contracts that Maltby had with the different people with whom he was dealing?

A. It had assignments of the accounts.

Q. And these letters that you have referred to, state whether or not, they referred to, or you were informed they referred to, these assignments?

A. I think they did.

Mr. Clark: I move to strike out the last two answers. This might leave the record in condition for defendants to argue that the bank had something else merely because the witness says he thinks they did.

The Court: It may stand. If they wish to show some other security and claim anything for it they will have to offer more definite proof than this, but this refers to the securities already in. It may stand.

Q. Now, at that time, Feb. 1st, 1903, what did the bank have of Maltby's that could be turned out to them as security in the way of personal property, being the property of the Maltby Lumber Company at that time?

A. Now, I couldn't tell you anything in addition to what I have stated. I think at this meeting that we had with Mr. Maltby, he did produce an inventory of what he was worth. And on the first of February, 1903, I think the bank was in possession of that property. That property consisted of all of his lands, all of his logging outfits; the real estate, and all the property that had been manufactured or in process of manufacture; I think it included practically everything, that Mr. Maltby had. I could not say whether or not Mr. Maltby owed anything to anybody but the bank at that time. I don't think I ever read Mr. Maltby's inventory of October 31st, 1902. I do not remember the different places where he had property at that time; however, they were a great many places. I remember the property at the Wheeler Yards in Bay City, and at the Ross Yard in South Bay City. I don't remember the property at the

Black Lake Branch of the D. & M. Railroad; nor at Case, nor at Nobisco, nor at Posen. I remember the Cleveland Branch, 263 of the D. & M. I don't remember the property at Temple, nor at Pinconning. I do remember it at the River Rouge. I don't remember the property at the following places: at Blanc's Mills, at Conway, at Boyne Falls, at Loone Junction, at Clarion, at Belding Hall, at Wheeling, at Omena, Moore's Siding, Geel's Siding, McGraw's Branch, Pigeon River, Hard Luck, nor at Churchill's Spur. There may have been others, but I can't recall positively now. Mr. Carswell was a man employed in the Davidson Ship Yard. He was a land looker. I think he had knowledge of the cedar business, poles and ties and cedar posts, and shingles. I think there were some shingles in mills in Maltby's securities, and one of the shingle mills we have on hand yet. I think there were only two. One of them we have on hand yet; that is, the machinery of it, and it is at the Davidson Ship Yard, and the other one was sold. Among the securities there were some Angola railroad bonds and stock, but they were sold. I may have seen those inventories you refer to, Exhibits T and Q on the former trial, and I may have seen the inventory of October 31st, 1902, but I don't now recall it.

Q. I show you your testimony on the former trial in regard to those two items?

A. Well, that is good now.

Q. "I show you inventory, Exhibit T, inventory of the Maltby securities, dated October 31st, 1902. What can you tell us about that?"

A. I could not tell you."

A. Yes, sir, that is right. The office fixtures of the Maltby Lumber Company were the desks and typewriters. We got that too. The Maltby Cedar Company was organized to wind up this business of the Maltby Lumber Company, and handle these securities. The business was not continued; it is in existence yes, in process of liquidation. I mean the company.

Q. Did the bank, when it took over the Maltby business, did it go on and carry on the business just as Maltby had been doing, before carrying out his contracts, making new contracts, and carrying on the business as a going concern?

A. Oh, no, it was for the purpose of realizing what they could. The bank took the position of realizing on the property as speedily as they could.

Mr. T. A. E. Weadock: The Circuit Judge, Chester L. Collins, is engaged in the trial of cases in his own court, and I presume the other side will consent that his testimony given on the former trial may be read.

Mr. John C. Weadock: Yes, we will.

264 CHESTER L. COLLINS, sworn for the defendants, testified as follows:

Examined by T. A. E. Weadock:

I have resided in Bay City since 1875 and am now Circuit Judge. I have known Orrin Bump very well, indeed; probably the latter part of the time he lived in Bay City, as well as I knew anybody. I have known A. J. Cooke since I came here. I have known Frank P. Chesbrough and J. W. McGraw for twenty years or twenty-five years. I have known Jas. Davidson and Jas. E. Davidson for twenty years. I have known Frank T. Woodworth since he worked in the Second National Bank. I have known A. M. Chesbrough for twenty or twenty-five years. I have known M. M. Andrews for twenty or twenty-five years. Before I was elected to the bench I practiced law in Bay City. I was acquainted with the father of Frank P. and A. M. Chesbrough, but did not know him well. I was a member of the firm of Holmes, Collins and Stoddard, soon after coming to Bay City. The firm was retained by the bank which afterwards merged with the Second National Bank. Alonzo Chesbrough, the father of Frank P. and A. M. was the president of the State Bank. Our firm were the original attorneys for the bank commencing in 1876. My attention was called to the dividend that was declared in 1903.

Q. What was laid before you by the directors with reference to that dividend?

A. The last bank statement, and I knew in a general way about the published affairs of the bank, and examined the law on the question.

I knew Mr. Alvin Maltby for twenty-five years. It was in October, 1902, that my attention was first called to the line of discounts which the Maltby Lumber Company had at the Second National Bank. Some one of the directors or Mr. Andrews called my attention to it. Very likely I did see the letter of the comptroller of October 21st, 1902.

Q. Please state what you did as the attorney for the Old Second National Bank, as soon as the matter of any difficulty in the Maltby line of discounts held by that bank was brought to your attention?

A. The question came up as to these accounts, that he had with the different parties, and with reference to the management of the business I do not have the dates fixed clearly in mind, but very soon after my attention was called to the matter if it was in October or along about that time, and between that and some time in

December, a good deal of attention was paid to ascertaining
265 the status of these different accounts, different railroad companies, and perhaps the telephone companies. Mr. Maltby was requested to make a statement showing his accounts; he brought in some statements made up of copies of bills with a memorandum attached showing the amount of the invoice. This was not satisfactory to me, nor was it satisfactory to any of the directors. It took some time to get this information, and it resulted in my going to Chicago to see some of these parties. I think I recollect

two railroads, the Chicago & Northwestern, and another railroad I do not remember now. I think it was the Chicago, Milwaukee & St. Paul. I got information which showed that Mr. Maltby's information furnished to the bank through me as I have stated, was incorrect. According to Mr. Maltby these companies owed him more than they admitted that they owed him. There was a great difference between the amount of actual indebtedness from their standpoint and from his. They went by their own books, and had their own methods of handling the matter, and at a certain time they would give credit for the poles or posts or whatever they were, and the difference between the credits given to the Maltby Lumber Co. and the payments they had their theory of and their idea upon their books, and that was different from what Mr. Maltby contended. The difference was in the amount owing from the companies to Maltby. Mr. McGraw did not go to Chicago with me. I met Frank P. Chesbrough on the street in Chicago, and he went with me to probably two of the offices. I informed him of my business and he gave his attention to it afterwards, and later from time to time.

There were consultations between the directors and myself, and at a certain date in January, I think it was, after we had become satisfied there was a wide difference between his former statements of those accounts and the statements as understood by the companies, he was called before a committee of the directors in my office. There were three directors there. According to my recollection, they were Mr. James E. Davidson, Mr. Foss and Mr. McGraw, although I may be mistaken as to the personnel of one or two directors.

It was stated to Mr. Maltby about how we found the situation and the difference between the one side as we stated it to him, and his statements of it, and he was then told that he should turn over the whole of his property to the bank in security for the indebtedness.

266 Q. In reference to the investigation as to the amount due from the several customers of Maltby to himself, did you carry that investigation beyond these two in Chicago?

A. It was started and carried out until it was arrived at.

Q. By some one besides yourself?

A. Some one else beside myself. I could not state the time it took to bring that about.

Witness resumes: According to my recollection Exhibit 80 called the general collateral agreement, is a paper that was the result of the meeting. As a part of the agreement that he made that day, deeds were afterwards taken, which it was assumed were deeds to all the real estate which he held. The business was in the name of Alzina Maltby. The titles to the real estate were conveyed from Alzina to Mr. James Davidson, trustee. As to the personal estate conveyed that is a later transaction. That January 5th agreement was the agreement made of that date and involved Mr. Lewis as going into the Maltby Lumber Company's office as a representative of the bank, but there were other papers that were drawn. The re-

sult was to put the bank in possession of practically all of his personal property and all of his real estate. That was followed by other proceedings, I think, in June. Now it seems that this joint collateral agreement undertakes to deal with bills of lading, shipping bills, and so on, or other collateral security held by the bank. The collateral held by the bank was in the form of bills of lading and inspection bills and such things as that in part. Then, I think there were letters between some of these people and the bank, customers of Mr. Maltby. These things were called to my attention, I believe, in October, 1902. I knew in a general way the amount of Maltby paper which the bank held. It was about \$400,000.00. I had no special information regarding it prior to October 1902. I saw the statement which Mr. Maltby made to the bank about January 1, 1903, when he was called upon for a statement of his business affairs. I remember the letter of May 13, 1903, from the deputy comptroller to Orrin Bump. I gave attention to the matter concerning the Maltby Lumber Company in that letter. That was part of the general work that I had in respect to the Maltby Lumber Company, at that time. I was giving attention to the matter more or less all the time. My attention was called to a copy of a letter dated May 19, 1903, addressed to T. P. Kane, and the correspondence between the comptroller and the bank on the Maltby business must all have passed under my observation. Prior to the conveyance

of Maltby's real estate to the bank there was no investigation
267 made as to the title or condition of the real estate that was conveyed. The object was to get everything that we could, and if the title was good, it was well, and if it was not good, we did not lose anything by getting a deed. I do not remember specific representations made by Maltby as to the value of the land. He described the mills which he had. I continued to give my attention to the Maltby security and the Maltby matter down to the close of 1903, and in fact as long as I remained attorney for the bank. Mr. Stoddard succeeded me as attorney for the bank in 1905. In connection with the dividend that was paid in 1903, the last printed statement of the condition of the bank was laid before me, dated November 17, 1903, I should say. The dividend was declared November 27, I believe.

Mr. T. A. E. Weadock: I offer the meeting of November 27th in evidence, page 163.

The Court: I think it is in evidence.

Q. Were you present at the meeting of the board of directors on that day?

A. I do not know. I was in the directors' room, and met them either as a board or informally. It was at the time when this matter was under discussion.

Q. For the purpose of fixing the date, I will re-read this resolution on the minutes of November 27th, 1903. "Motion made by James E. Davidson, seconded by Foss, that a five percent. dividend be declared on the capital stock to be paid December 1, 1903." What did you advise the bank in reference to that matter?

A. I had examined the statute on the subject before I gave my advice. My attention was called to it. My advice was that the stockholders were entitled to a dividend unless the situation was such that it was brought within some of the prohibitions of the law.

Witness resumes: I had a copy of the printed report of November 17th, 1903, and I knew in a general way about the property of the bank. Mr. Andrews, cashier, was called in to the directors' meeting when this matter was under consideration. I understood the dividends had been earned. My advice was that a dividend should be paid.

Mr. T. A. E. Weadock: I call your Honor's attention to the fact that the record shows that Mr. Chesbrough was present at that meeting.

268 Q. Did you form any judgment as to the value of the different securities, which the bank held, or was that a matter outside of your lines?

A. I do not know that I sat down and figured up the amount of securities that the bank held at that time, no. I knew a lot about it at the time in a general way.

Q. What was your judgment then in a general way as to the securities which the bank held for its indebtedness.

Mr. J. C. Weadock: I submit he is asking the gentleman's knowledge of the value.

The Court: I understood the judge to say he had not figured out the value.

Mr. J. C. Weadock: He has shown no knowledge sufficient to enable him to form an opinion.

Mr. T. A. E. Weadock: I am taking his judgment as possibly a little better than an ordinary working lawyer as to the value of securities, if he knew. If he did not, I presume he will say so.

The Court: I will sustain the objection to that.

The defendants excepted.

Mr. T. A. E. Weadock (Referring to page 431 of the testimony of Mr. Collins): We want the benefit of a ruling.

The Court: You cannot read any questions here that Judge Swan sustained the objection to, and no answer taken, unless you bring the witness here. You cannot read a question and the ruling of Judge Swan upon it here in this trial, because you could not get the answer if I should rule the other way.

Mr. T. A. E. Weadock: My point is this: We could ask the same question if Judge Collins were here, and your Honor should hold that question was not competent, then we would have the benefit of an exception if we were right, notwithstanding the fact the witness was not here.

The Court: You would get error in the case as a result. If you want Judge Collins as a witness, you can bring him here, but you cannot read the questions before this jury, objections to which were sustained by Judge Swan and no answer taken, because no
269 good can come from that, and I will not permit it.

Mr. T. A. E. Weadock: Note an exception.

Under the above ruling, the portions of Judge Collin's testimony herein italicized were not read to the jury.

Mr. T. A. E. Weadock: That is the same question asked and answered by Mr. Foss. I will withdraw it for the present.

(Reading of testimony resumed:)

I know the old indebtedness of what is called here the old indebtedness of Alvin Maltby as an indorser of the Mosher concern to the Second National Bank. I know from Mr. Bump that at one time payments were made on Maltby's direct liabilities in that indebtedness. During the Mosher failure, Mr. Maltby tendered a lot of property in Presque Isle County as an application upon that debt. A deed was very hastily prepared; it was held, Mr. Maltby stated, under contract from Mitchell of Cadillac, hard wood lands. It was afterwards realized on. There was litigation in connection with it before it was realized upon. Probably \$25,000.00 was realized.

Q. So far as you know in this case from beginning to end of the Maltby Lumber Company indebtedness, was the action of Frank P. Chesbrough or Joseph W. McGraw in any wise different from any other of the directors.

Objected to as incompetent and immaterial.

Objection sustained, and the defendants excepted.

Q. Did Frank P. Chesbrough fail to do anything which he should have done as a director, so far as the same came within your knowledge, in reference to the Maltby Lumber Company paper?

Objected to as incompetent and immaterial.

Objection sustained and defendants excepted.

Q. I ask you the same question in reference to the defendant, Joseph W. McGraw?

Objected to as before.

Objection sustained and defendants excepted.

Q. State whether or not so far as you know through this entire transaction, the action of Mr. Chesbrough or the action of Mr. McGraw was in any wise different from the actions of any of the other directors of the bank.

Objected to as before.

Objection sustained, and the defendants excepted.

Q. State whether or not in your judgment, the board of directors of the Second National Bank did everything which they could have done to protect the interest of the bank in reference to the
270 *Maltby Lumber Company line of discounts?*

Objected to as incompetent and immaterial, also, because a violation of law may be to protect the interests of the bank and nevertheless be a violation of the law.

Objection sustained, and defendants excepted.

Q. You may state whether or not it was the judgment of the

board of directors in January, 1903, that the Maltby Lumber Company's indebtedness to the bank was properly secured?

Objected to as before.

The Court: Do you know that from participations in the meetings of the board?

A. I have a knowledge from meetings of the board informally.

The Court: Not what was told you by others?

A. I know of a sort of general understanding that was had and believed at that time. That is the belief that was expressed.

Objection was sustained, and defendants excepted.

Mr. T. A. E. Weadock: I do not desire to argue the matter after it has been decided, although that has been the rule here. But it does seem to me that it bears directly on the matter of notice and on the matter of knowledge. It surely cannot be held that a director who knows that the bank holds a line of paper which in his judgment is secured, that he is doing anything wrong when he signs a statement which is true and correct, according to the books of the bank, or the only reason that could be urged against it would be something that occurred long afterwards, when it turned out that some of this paper was not paid.

The Court: To what line, do you specially refer in this case?

Mr. T. A. E. Weadock: The matter to which I am referring now is 1909, when we have the knowledge that we have today. But what I want to show is the knowledge that these directors had in 1903, and the knowledge that these gentlemen had in November, 1903, after all these things had occurred, when Judge Collins was called in and advised that it was proper for them to pay a dividend. It seems to me that it is competent in this case.

Mr. J. C. Weadock: The question still remains the same. He asks him what the judgment of somebody else was. I submit that it is clearly incompetent.

271 Mr. Clark: Our only objection is to the manner of proving it.

The Court: I will exclude it for that reason. I do not exclude evidence of that character. It is the question that I exclude.

The defendants excepted.

Q. What was your judgment as to whether or not that debt was secured?

Objected to.

The Court: I will ask the judge this question: Did you examine the securities tendered by Mr. Maltby and put a value upon it?

A. I did not value the security in the way of making a valuation or appraisal or anything of that kind. I had knowledge in a sort of general way.

The Court: But did you not base your own judgment upon it?

A. I do not know that I based my own judgment.

Q. Do you know whether or not a certain amount of the moneys advanced to the Maltby Lumber Company upon the discount of

papers, used at the bank was applied in retirement of what we have called the old indebtedness of Alvin Maltby?

A. I do not know that that is the fact. I never heard of that.

Q. What sort of man as to honesty and integrity was Orrin Bump?

A. He was absolutely and thoroughly honest. I think he was one of the very best.

I think the Old Second National Bank paid dividends from the time I was first connected with the bank until the close of the year 1903. The rate of dividends was from 10 to 12 percent, so long as I was with the bank. I was not consulted with reference to the dividends paid in June 1903.

Cross-examination.

By Mr. John C. Weadock:

The usual attorney's memorandum was kept on this business. It would not show accurately when I first took the Maltby matter. It indicates that I was in Chicago the 23rd or 27th of December, and the matter was taken up in the bank some considerable time before that. I do not say that my first information as to the status of the Maltby account came from the letter of the comptroller in October, 1902. The matter was brought to my attention by some one of the directors, some time in October, and as a matter of inference I fix it very shortly after the letter was received. From that time until I severed my connection with the bank, the Maltby account was a matter of constant consideration. I attended some of the meetings and also discussed the matter with the directors outside. When I would meet directors at other places than at the office of the bank, the subject matter of the Maltby account was undoubtedly under discussion. That applies to each and every one of the directors. I distinctly remember talking it all over frequently with both McGraw and Chesbrough from October 1902. I talked the matter over with McGraw and Chesbrough. In December, I met Mr. Chesbrough in Chicago, and we talked the matter over. We went to the offices of the Chicago and Northwestern, and the Chicago, Milwaukee & St. Paul. I ascertained enough to make me believe that Mr. Maltby did not correctly state the matter as to the amount owing from the company to the Maltby Lumber Company, and I think Mr. Chesbrough agreed with me. We certainly did discuss it. I do not know the amount of the discrepancy, but it amounted to a great many thousand dollars.

272 Q. You saw it was as to some of them as high as from thirty to forty thousand dollars?

A. I would not say, although it might have been.

Q. That figure does not seem unreasonable in connection with these accounts?

Mr. T. A. E. Weadock: I object to that as incompetent and immaterial; objection overruled, and exception taken.

A. Thirty or forty thousand dollars seems large for any one of the accounts.

Q. Twenty or thirty thousand?

A. Fifteen or twenty thousand in one or two instances, although it may have been more.

Q. I presume after your return to Bay City, if not before your trip to Chicago, you made an examination of the drafts themselves, did you not, that the bank held?

A. I don't recall giving much attention to that.

Q. Did you possess yourself of the paper that the bank had which was held as so-called collateral for the drafts?

A. I have seen it. I did not possess myself of it. I had figures of Mr. Maltby that answered my purpose as an attorney.

Q. You learned at that time—and I am speaking of the latter part of 1902, or the very first days of January, 1903—that the papers which the bank had outside of the drafts themselves were certificates of inspections, and so-called bills of lading?

A. I saw those papers, a lot of them.

Q. Did you observe the date of those papers—the bills of lading?

273 *Objected to as incompetent; overruled, and defendants excepted.*

A. Some of them I did.

Q. At the time you commenced this examination or at the time you conducted this examination in 1902, did you find a single bill of lading that in any way, shape or manner or form, gave to the possessor thereof the control of the property described therein, and if so, state what one it was?

Mr. T. A. E. Weadock: I object to that as incompetent. I did not ask him anything about that. He did not see the bills of lading. I asked him what was reported by Mr. Bump as to the collateral, and Mr. Collins did not examine the collateral.

The Court: I understand Mr. Collins did see the papers and examined them.

Mr. T. A. E. Weadock: No, he may have seen some of them.

Mr. John C. Weadock: I am not contending that he saw them all.

Mr. T. A. E. Weadock: I certainly have not gone into that question with this witness, and they are held to the rule that I could not go outside of on our part on the direct examination.

The Court: I think you are wrong, I will give you an exception. The defendants excepted.

A. I saw a number of those. I do not remember the terms of one of them.

Q. But immediately after seeing that, you started out to get security, isn't that true?

A. It was after seeing them, yes. The security question did not come up until that meeting of the 5th of January. That was the first time the security question came up, but prior to that it was getting at the situation as to the account. I am speaking about my work.

Q. But because of the conditions that existed as you ascertained them and reported them to the board of directors as the board of

directors may have ascertained them from other sources, the bank in the first of January, 1903, commenced vigorously to undertake to get securities, and put itself in a position to control the transaction of business by the Maltby Lumber Company?

A. In view of what had been learned by myself and others, and in view of the situation as it appeared, the bank demanded of Maltby at this time, I speak in January the securities and so forth, that were put in shape immediately following that demand. It de-
274 manded the securities and the papers were drawn up on that date in accordance with the demand.

Q. For the purpose of getting a sort of general security, and the application of the securities to all papers, this paper of the 5th of January, 1903, was drawn?

A. That was one of the documents.

Q. In addition to that, did not you take a conveyance of all property of the Maltby Lumber Company in January, 1903, the conveyance running from the Maltby Lumber Company and signed by it, and taken for the benefit of the bank?

Objected to as incompetent, because the papers are the best evidence.

The Court: Do you ask for the contents?

Mr. J. C. Weadock: No, but the existence of such paper.
Objection overruled and defendants excepted.

A. I should say no to that.

Q. Describe the papers that they did take. You understand I am not asking for the contents, but the general purport.

Objected to.

The Court: He may state whether or not they were deeds or mortgages, or what they were.

Witness resumes: There was the paper dated Jan. 5, 1903, being Exhibit 80, and the deeds, and I believe an agreement with the Maltby Lumber Company to give such further things as were necessary. The deeds came along later. I think the Old Second National Bank insisted it must put Mr. Lewis in the office of the Maltby Lumber Company, and that no moneys should be paid out without the approval of Mr. Lewis representing the bank.

Q. Wasn't it understood at that time and agreed between the bank and the Maltby Lumber Company that the fact that Mr. Lewis representing the bank in the office of the Maltby Lumber Company, was not to be made public?

Objected to as incompetent, insofar as it asks as to what was understood and as immaterial, as to whether or not it was to be made public.

The Court: All of the res gestæ of this transaction may be shown here.

Objection overruled, and defendants excepted.

A. I could not state with positiveness one way or the other.

Q. Your best recollection?

275 A. My recollection is somewhat indistinct. I know what one side wanted and I know what the other did not care one way or the other about, but I do not believe that I can give you a recollection that would throw any light on the matter.

Q. Later in the same year and in May, 1903, when you took certain deeds for the benefit of the bank, didn't you take them in the name of James Davidson?

A. James Davidson, trustee.

Q. Do you remember that the word "trustee" was there?

A. I should say it was in some of them. I am not stating what the intention was, but I know what the objection was.

Q. There is no dispute about the objection, but the deeds have been offered, and none of them are in the name of James Davidson, trustee. They are all in the name of James Davidson. If you do not remember the fact as to whether they were in the name of James Davidson, or James Davidson, trustee, could you give us any reason why you took them in the name of James Davidson, and not in the name of the bank?

Objected to as incompetent and immaterial; objection overruled and defendants excepted.

A. I know we wanted to take them in the name of James Davidson, or James Davidson, trustee, and I know we did not want to take them in the name of the bank.

Q. Why?

A. It was a better business proposition to have them in the name of Davidson.

Q. And a better reason is that you did not want the public to know that that security was taken from Maltby by the bank, isn't that true?

Objected to as incompetent and immaterial; objection overruled and exception taken.

A. I would not want to put it as strong as that.

Q. Put it as strong as you think the facts will bear?

A. I can tell you that I did know as a matter of fact and belief, and the public would know just the same.

Q. I ask you in relation to that item, whether you did not take the deeds in the name of James Davidson, or James Davidson, trustee, instead of in the name of the bank, because you did not want the public to know, and when I say you, I mean the bank?

Mr. T. A. E. Weadock: I object to that as incompetent, and for the further reason that it is not shown that either McGraw or Chesbrough knew anything about it. This is not a suit against the bank or the directors, it is a suit against the two.

276 Objection overruled, and defendants excepted.

A. Well, that is a part of it, yes, let me see one of the deeds. I had it in mind that it said "trustee."

Witness resumes:

Mr. McGraw did not so far as I know, go out for the purpose of

ascertaining information which he supplied to the bank in relation to the Maltby items in the fall of 1902, or in the spring of 1903. I do not recollect that Mr. Foss made an investigation. Mr. McGraw was on the committee of three directors to investigate. We knew at the meeting what Mr. Maltby claimed, and we had evidence as to the contrary, and it was simply to settle the matter with the Maltby Lumber Company.

Q. At that time, what was the amount of drafts as you understood it to be that was held by the bank drawn upon the railroad companies?

Objected to as incompetent and objection overruled; defendants excepted.

A. I only had a general knowledge of the amount of the indebtedness, and I do not remember what it was then of what knowledge I had of it. It was a large amount of money.

Witness resumes:

The fact that there was a big difference between the amounts owing to the Maltby Lumber Company, and the amount of the drafts, was ascertained prior to the 5th day of January, 1903. It was understood and that explains partly why I did not have an accurate memorandum as to those amounts. I was more concerned getting it in shape than I was to carry in my head the different amounts. With reference to the deeds, we took one for every piece of land that they furnished a description of—the descriptions were taken from their plat book, purporting to be owned by them. It was our effort and the fact was known to Mr. Maltby, to get all the property that belonged to him.

Q. After the procurement of those deeds, did you give the title some consideration?

Objected to as immaterial, objection overruled and defendants excepted.

A. I examined a lot of abstracts coming from that office, but I cannot give you any detail.

Witness resumes:

I knew that some lands were tax titles, but I do not have any accurate information regarding this. I do not recollect that large numbers of descriptions were conveyed to James Davidson or Mr. Maltby.

277 Q. Will you tell me what proportion of your time during the year commencing, say the 15th of October, 1902, to the first of June, 1903, you put in on the matter of the Maltby account of the Old Second National Bank?

Objected to as immaterial; objection overruled and defendants excepted.

A. I practically transacted all the business with Maltby. It occupied a considerable part of my time for each month, but I cannot give you the exact amount.

Q. And during all the time after whatever date it was in October 1902, that this matter came to your attention, down until you ceased

to give it any attention at all, there were frequent meetings, in your office of the different directors of the bank, and frequent meetings between them and yourself, and between them and Mr. Maltby, and frequent meetings at the office of the bank when the board was not in session, and frequent meetings when the board had just adjourned, or before it had commenced doing business, were there not, so that as a result of all this, you met some manager of the bank in relation to the condition of the Maltby account on an average of once a day from the fifth of October to the 1st of January, 1904?

Mr. T. A. E. Weadock: I object to that as incompetent, because it does not name any one, and because the witness has not said that he ceased to give attention to the matter, except on the termination of his employment as attorney for the bank.

Objection overruled, and defendants excepted.

A. I said a moment ago that I was the one on behalf of the bank, that had the personal dealings with Mr. Maltby. I attended a number of meetings of the directors, either formal or informal, and I had numerous discussions with different directors from time to time. I had discussions and consultations with the cashier. There may have been, and probably was, a few meetings in my office when Maltby met one or two or three directors and myself on some point. There were not very many of those, and probably none to speak of after the transfer of June 1903. I gave a great deal of time to that myself. I am speaking about that part of it which came under my personal observation.

Q. You advised the Old Second National Bank through its board of directors and executive officers that these papers which they had purporting to be collateral, and I am referring now to the so-called bills of lading, and the certificates of inspection, that so far
278 as those papers were concerned they were, and gave to the bank, absolutely no security, didn't you?

A. I can answer that question shortly, I saw the bulk but did not examine them minutely. I saw a number that I knew were of no value for any purpose, and I so informed any one of the directors that I talked with. But to assume, and think that I saw and handled all of that paper, is entirely incorrect. It was not a question with me as to the amount; it was a question as to the right or wrong of the transactions.

Witness resumes:

In addition to being counsel for the bank, I was counsel for Frank P. Chesbrough during the time from October, 1902, until I ceased to be counsel for the bank. We met frequently. We discussed the Maltby and Brotherton matters, I probably told him in general what I had done, and, if he did not already know, probably that was as far as it went. He might have made suggestions.

Q. To get right to the point I have in mind, if he did not already know it, you let him know the fact that there was a large difference between the aggregate of the amount that these railroad and tele-

graph companies were owing to Maltby, and the amount Maltby represented was owing him by those companies?

Mr. T. A. E. Weadock: Objected to as incompetent. That has not been gone into with this witness, except as to the Chicago, Milwaukee & St. Paul, and it has not been gone into with this witness as to the others.

Objection overruled, and defendants excepted.

A. I think he knew in a general way. How much detail he knew, I, of course, do not know.

Q. You have testified, as I have a memorandum, that it was your recollection that the Old Second National Bank paid a dividend from the time of its organization down to the close of business 1903?

A. I understood the question to be the Old Second National Bank. I speak of that, because it was the Second that paid these larger dividends.

Q. Take it in 1895 and 1896, did you pay dividends?

A. I don't remember.

Q. How about 1896?

A. I could not answer the question?

Q. Or 1897?

A. I could not answer for any one year.

Q. The record here of the meeting of December, 1895, shows they passed the dividends?

A. Since you have referred to that, and of course, that brings up something that I did not have in mind in answering the question, and probably at that time the dividends were passed.

279 Q. Since I have referred to the black eye of 1895, you do know that they passed a dividend, and that they charged off a hundred thousand dollars of their capital in order to take care of bad paper?

A. I remember the fact that they reduced the capital, and probably that is all I can remember about it, because I did not go into the financial details.

Q. You do know as a fact that they did not pay anything back to the stockholders by the report?

A. I presume that is correct.

Redirect examination.

By Mr. T. A. E. Weadock:

Witness resumes: I gave as much time as was necessary to properly discharge my duties in regard to the Maltby Lumber Company as affecting the Second National Bank in 1902 and 1903. I talked with Mr. Chesbrough the same as to any director that I talked with. I do not think Mr. Chesbrough had any business during all that time that conflicted in any way with the Second National Bank. There was a difference between Maltby and the railroad company as to when a lot of these things came due. There would be a lot of ties and poles and one thing and another that would be between the point of Maltby's claimed shipment, and the point of acceptance by those

companies, that represented quite an amount, I do not know how much. I do not know that there was some times afterwards given to a verifications of those claims. The two railroad companies in Chicago stated that the recognized place of delivery was different from what Maltby claimed it would be, or rather that would leave quite an amount between the place of shipment and the place of wherever they claimed the place of delivery would be, in Chicago or Milwaukee, or somewhere. The deeds to Mr. James Davidson were held by him in trust for the bank.

Q. I hand you a bunch of deeds, and ask you whether you drew those deeds or whether they were drawn in your office?

A. This package was drawn in my office. I would say those deeds were not (separating them into two packages).

Q. You say two deeds, one in Iosco County of Alzina Maltby to James Davidson, trustee, and a quit-claim deed from Alvin Maltby and wife to the Maltby Cedar Co., were not drawn by you?

A. Yes.

Q. The latter deed is marked "Stoddard and McMillan?"

A. Yes, in 1907.

Witness resumes: I know the handwriting of Orrin Bump. The deed from Alzina Maltby to Alvin Maltby, Schedule A, No. 4, was prepared in my office, and I took the acknowledgement. The indorsement on the back of Exhibit P. is Orrin Bump's. I could not say whether that statement was ever brought to my attention. It is my impression that I either saw it or heard of it. I did not know of any division of opinion or want of agreement between the seven members of the board of directors of the Old Second National Bank in this Maltby matter.

Q. State whether or not these directors and all of them, and each of them so far as the matter came to his attention, did what in your judgment he should do as a director in the bank in support of the interest of the bank?

Objected to as incompetent, immaterial and irrelevant to the issue in this case; objection sustained, and the defendants excepted.

Witness resumes: In regard to the red box marked "Exhibit O," Second National Bank, containing a large number of drafts and bills of lading, and inspection certificates and so forth, I have dipped into it, but never examined the whole line of paper. I did not consider that there was any occasion for my examining it.

Q. I show you drafts dated May 7, 1903, made by the Maltby Lumber Co., on the Chicago, Milwaukee & St. Paul Railway Company, attached to which is a bill of lading and two certificates of inspection and an invoice from the Maltby Lumber Company against the Milwaukee, Chicago & St. Paul Railroad Company, dated Nov. 24, 1902, with a statement: "Pay this amount in regular course to the Old Second National Bank, Bay City, Mich.," signed Maltby Lumber Company, in the handwriting of Alvin Maltby, and ask you whether that or any similar paper was ever handed to you for your opinion as to whether that placed the title to the property mentioned in the bill of lading and inspection certificates in the bank?

A. I was advised or counseled with on that subject, and I believe that that substantially was what I recommended. This is May 7, 1903.

Q. State whether or not the letters which these different companies have sent to the bank in reference to the payment of the amount due Maltby in due course were, also, brought to your attention at about the same time?

A. I remember going into that subject at a time and making a recommendation and an opinion, and I believe that that is a part of the topic that was in my mind, and one of the chain of things that I thought made the title good after that was signed.

Q. I call your attention to the drafts dated March 3, 1903, drawn on the Maltby Lumber Company, on the Chicago, Milwaukee & St. Paul Railroad Co., for \$620.40 attached to which are a bill of lading and two certificates of inspection to which I have called your attention, and also an invoice dated Nov. 29th, 1902, the bill of lading being dated Nov. 23, 1902, and an invoice for the same amount as the draft, and ask you whether or not with the indorsement on the invoice to which I called your attention, that puts the title to that property described in the bill of lading, and the inspection certificates in the Second National Bank?

A. I am not proposing to pass upon that present question. I believe this memorandum here in red ink with the rubber stamp follows the line of what I suggested. Mr. Clark called my attention to this date November 29th, and that puzzled me for a moment, because I did not believe it originated at that time. But as I now look at it, if this draft and that was all a part of the same transaction, then I think at that time I considered that that put the title in the bank, and that that is in harmony with the advice that I gave on that point.

Q. Were the letters which were written by the Western Union Telegraph Company, the Michigan Central Railway Co., and other companies which were customers of Maltby, brought to your attention?

A. They were. I will not say that I saw each and every one of them, but I had knowledge of them, and I think it was a part of the plan of getting it into better shape.

Witness resumes: Exhibit G, a letter of the Western Union Telegraph Company, dated August 10, 1900, was brought to my attention; also, Exhibit J., Pere Marquette Railroad Company, dated July 28th, 1903; also, a letter, Exhibit K, the Chicago, Milwaukee & St. Paul Railroad Co., J. P. Mole, roadmaster, dated Sept. 1, 1899. I think I, also, saw a letter of S. E. Mason, Exhibit H, storekeeper Western Union Telegraph Co., dated Chicago, and Exhibit P., a letter of R. A. Griffin, purchasing agent of the American Tel. & Tel. Company. I would say the same in relation to Exhibits L, M, and I. If these papers were a part of the papers pertaining to the Maltby business and were in the hands of the bank between October and December, 1902, they came under my observation.

Q. State whether or not all of these letters were considered by you

in the formation of your opinion with reference to the transfer of title to this collateral on the part of the Maltby Lumber Company?

A. I have a rather indistinct recollection of drawing that stamp that was stamped on the invoices, to carry out and complete the title of the letters and other correspondence.

Q. What did you advise, if anything, as to whether or not this assignment transferred that indebtedness between these companies and Maltby to the bank as well as the property?

A. That was the intention of it, to complete the transaction so that the indebtedness and the property and all, so that Maltby would be out of it and the bank in it.

Recross-examination.

By Mr. John C. Weadock:

Q. I show you a statement dated April 3, 1902, bearing the same stamp?

A. I know the fact that that stamp was put on there at an earlier date than what I had in mind.

Q. So that the recollection founded upon the stamp itself is not now with you?

A. Not in the same way.

Q. I am holding here the papers which counsel held when he asked you the question, and in order that the record may be complete, I will read it. "Bay City, Mich., March 3, 1903. 60 days after day pay to the order of the Old Second National Bank of Bay City, Mich., \$620.40, value received, and charge the same to the account of the Chicago, Milwaukee & St. Paul Railroad Company, (Chicago, Ill.) Signed Maltby Lumber Company, Lewis. Number 1359."

Next a document handed Maltby Lumber Co. (other papers read).

Let me ask you whether there is anything in those papers which shows that the title to the property, namely, ties, under these papers, was at any time under consideration ever in the Old Second National Bank of Bay City?

A. Possibly that does not pass the title to the timber.

Q. Having your attention called to these papers, isn't this what you advised the Old Second National Bank, viz: that to put this endorsement on the account, and get an assignment from the Maltby Lumber Company to the bank, and get all that Maltby had so as to take Maltby's place in respect to the different companies owing the Maltby Lumber Company, isn't that the gist of what you advised the Old Second National Bank?

A. Well, I really do not catch your question. There is a little point that is not clear in my mind.

Q. Did you find a single paper attached to a draft in this box, or bill of lading or any other which you have ever seen, upon which you advised the Old Second National Bank that the property described in the bill of lading passed to the Old Second National Bank?

The Court: The witness has testified concerning this paper. What other papers he may have in mind I do not know.

(The question was not answered.)

Q. I will ask you whether, after having seen these papers you ever advised the Old Second National Bank that they had any title to these poles or ties as they are referred to in these bills of lading?

283 Mr. T. A. E. Weadock: I object to that as incompetent, because it does not appear that this is the paper upon which the Judge made his opinion. If that question is to be asked, he should have an opportunity to find the paper.

The Court: He has an opportunity, but, I understood the Judge to say he did advise upon this paper, which is now produced in the red box. He says, "I did not examine the whole line of the contents." You showed him a draft of March 3, 1903, on the Maltby Company bill of lading, two inspection certificates and an invoice attached. "I advised that this put the title in the bank."

Witness: I do not recall the testimony the same as the Judge has it on his minutes.

Q. Did you ever advise the Old Second National Bank on papers of that kind, that that placed the title of the property in the bank?

A. I don't remember distinctly. I do remember taking up the question of putting it in shape where there could not be any question about it, and advising and planning a set of papers. And it seems familiar to me when I see it, as a part of it. I am inclined now to think I was mistaken in the effect that they should have had.

Q. As a matter of fact, did you ever advise the Old Second National Bank, that it has title to any ties or wood products of any kind by virtue of any bill of lading that ever came to your attention?

Objected to as incompetent, irrelevant, and immaterial; objection overruled, and defendants excepted.

A. I do not recall that situation as stated.

Q. Am I to understand from that that you do not recall giving and such advice?

A. I do not recall that the situation came up in the way that you speak of. I do recall that I attempted to get up something that would meet that situation, and which I believe did, and when I first answered the question I believed these papers represented a part of that situation.

Q. But the situation, whatever it was, was hazy, in your mind, and you cannot state now what the situation is that you endeavored to rectify?

A. I cannot.

Q. You do not mean to say to this jury that you ever told this gentleman that the stuff, meaning the title to the ties, and that the title to the ties passed to the bank, and by ties I mean kind of forest products?

A. I guess you do not understand my position. I undertook to get up a set of papers which when used, would transfer without any

question the money, and that would give as full control as possible of the property. And it is my impression that there was such a set, and it was used and I believed it would accomplish that purpose.

Q. This is not the set?

A. I don't think so now.

Q. And you haven't seen it since you have been on the stand?

A. No, sir.

Mr. J. C. Weadock: In connection with the cross examination of this witness, I offer in evidence the proceedings of the board of directors of the Old Second National Bank, under date of December 14, 1894, and also, under date of December 2, 1895, the two proceedings referring to the passing of dividends. The witness testified first, he thought they had paid a dividend continuously, then he corrected that testimony and was not so sure. Offer the proceedings, showing that they did not declare a dividend because they had bad doubtful paper.

Mr. T. A. E. Weadock: I except to that statement.

Mr. J. C. Weadock: I will add to that offer the proceedings of June 7, 1895.

Objected to as incompetent and no part of the cross examination of this witness.

I want to say to the court that we will read all this record in regard to dividends of the Old Second National Bank down to date.

(Minutes of the three meetings read.)

The material parts of said minutes were as follows:

Regular Meeting.

BAY CITY, Dec. 14, 1894.

Present: Directors Bump, Smalley, McGraw, Chesbrough, Noyes, Eddy and Cooke.

Moved by Mr. Cooke that a dividend of three per cent. upon the capital stock be declared payable at once.

Messrs. Smalley, Noyes and Cooke voted, Yes.

Eddy, Chesbrough and McGraw, No.

Mr. Bump voted, No. Motion lost.

Mr. Eddy moved that \$30,000.00 be charged to Profit and Loss, and credited to surplus account. Carried.

Regular Meeting.

June 7th, 1895.

Present: Directors Bump, Smalley, Davidson, McGraw, Chesbrough, Noyes and Cooke.

Motion by Eddy that \$20,000.00 be carried to surplus account, supported by McGraw.

Amendment by Cooke that a dividend of three per cent. be declared and \$10,000.00 to surplus—supported by Chesbrough—lost. Original motion prevailed.

Dec. 2, 1895.

Present: Directors Bump, Eddy, Chesbrough, Noyes, Smalley, Cooke and McGraw.

The following resolutions on motion of Mr. Smalley were carried:

Whereas: The net profits of the Old Second National Bank in the past six months are \$20,158.29, and that in view of recent failures involving possible loss, therefore, resolved, that we do not deem it expedient to declare a dividend at this time. Also, resolved, that \$2,000.00 be carried to surplus account, and the balance of the earnings \$18,158.29 be left in Profit and Loss account.

Redirect examination.

By Mr. T. A. E. Weadock:

Q. Was the information which you gave of the directions to the Second National Bank in reference to the form of doing his business or putting the title to the products and the indebtedness in the bank in writing, or do you remember?

A. As I remember it, it embodied certain forms of doing it.

Q. Who did you transact the business with?

A. I do not remember. It was someone in the office.

Q. Could you pick out from the paper in the red box the particular papers upon which you passed your opinion about the matter we have in hand, or without examination of all the papers?

A. I would not want to undertake to look through that box.

Q. Do you remember the date of Aaron J. Cooke's death?

A. I do not.

Q. What was the condition of Mr. Cooke's health during the last part of 1902, and the early part of 1903?

A. Very bad.

Q. Had he then retired from active business?

A. He had several years before. When in active business, he was in the dry goods and later in the carpet business. The latter part of his life he was a librarian in the Bay City Public Library. He was active until a year or so prior to his death.

C. L. COLLINS (recalled).

Examination resumed.

By T. A. E. Weadock:

In regard to Mr. Carswell testifying that he made some reports as to the condition of the Maltby Lumber Company property and securities to me, I do not remember whether he reported in writing or whether he talked to me from a book. I tabulated them and turned them in to Mr. Andrews shortly after they would come
286 in, and possibly they might have run for some time. The management of the Maltby Lumber Company property was not in my hands at all, that is, the real estate. I do not remember Mr. Carswell's report. Whatever information I got was turned over

to the bank. While I was attorney for the bank I do not think I was called upon to investigate the title as to any of these lands. I do not remember the details as to the land at all, although I do remember handling the abstract that there was to the property on some previous sales, but the descriptions of the bonds were furnished from Maltby's books, and the deeds were made from those. Our guide in reference to these lands was Maltby's real estate books and such abstracts as were turned over.

Q. Some question was asked you when you were on the stand before with reference to the manner in which the title to these bills of lading and certificates of inspection and so on, were transferred by the Maltby Lumber Company to the bank. Do you remember whether or not you gave a formal opinion upon that or whether or not the statement of facts were submitted to you by Mr. Bump and you expressed an opinion upon the facts submitted to you by Mr. Bump?

A. I do not remember specifically about that, although it seems to me that I must have had something to do with that stamp that was shown me here the other day.

Q. You were shown a particular bill of lading and certificate of inspection and so on, and you said in your opinion, the paper that was shown you did not put the title to the property in the bank?

A. I said that I would not say that it would.

Q. Was there such a state of facts at any time submitted to you that you gave an opinion based upon those facts that they did transfer the title to the bank?

A. My recollection is that shortly after this in January, I prepared a formula of some assignment or indorsement or acceptance or something of that kind that in my opinion transferred the title to the bills and constructively or practically to the property.

Q. When the Maltby Lumber Company began doing business with the Old Second National Bank, and the question came up of dealing with the railway and telephone companies, owing to their custom of never accepting drafts, state whether or not you advised Mr. Bump with reference to the legal status of those transactions?

A. I do not have a distinct recollection of that, but I have an impression that that printed stamp refers back to that date.

Q. State whether or not Mr. Bump from time to time as he took those bills of lading and certificates of inspection and assignments, and so forth, submitted them from time to time to you, and whether he acted upon the matter as first outlined to him?

A. He did not submit them to me. He had talked with me about the matter generally, and he claimed that he had collateral.

Q. And if Mr. Bump made statements to you as attorney for the bank that he had collateral for particular lading, did you call upon him to produce the collateral?

A. I did not.

Witness Resumes: I did not ask him what the collateral was. There was no call for me to do that. That is to say I was the attorney for the bank and was their advisor, on such things as they asked

advice upon. If Mr. Bump stated that he had collateral for a certain loan, my belief would be that he had the collateral, because of my knowledge of his knowledge of the business. I believe Mr. Bump's health affected his business capacity during the past years of his life. During the year prior to the time of his connection with the bank ceasing I saw him practically daily.

Q. State whether or not you were called upon from time to time by the board of directors of the bank after Mr. Bump went away more or less frequently than you had been before he went away?

A. Well, I do not recall anything particular about that, until I was called in at the date we have fixed as in October.

Q. And Mr. Bump was then absent from the bank on leave?

A. Yes, he was.

Q. As a matter of fact his practical connection with the bank ceased at the time he went away on his leave?

A. I so understand.

FRANK P. CHESBROUGH, sworn on behalf of the defendants, testified as follows:

Examined by Mr. T. A. E. Weadock:

I am one of the defendants in this case; my age is 52; I live at the Village of Grosse Pointe Farms, near Detroit, Michigan; I have lived there nearly nine years; I moved away from Bay City in 1905; since that year I have lived in Detroit or at Grosse Pointe Farms all the while; I am the son of Alonzo Chesbrough; formerly of Toledo; and the other sons were Aaron, Abram M. and Fremont; after my father's death we four constituted the firm of Chesbrough Brothers for a time; I think my father, in his life time, was with the Old State Bank; I don't know that that bank was consolidated with the Second National Bank, but I think it was; I don't remember the year of the consolidation; I know Will McGraw; I have known him
288 quite a while, since he was a young man up at South Bay City, a good many years ago; I know James Davidson, the ship-builder and ship owner; I should say I have known him 25 years; maybe I have known him longer than that; I have known James E. Davidson, his son, president of the bank now, ever since I lived on Center Avenue, Bay City, fifteen or twenty years ago; I lived on Center Avenue for 20 years, I guess, before I moved to Detroit; Edgar B. Foss, at one time lived on Sixth Street and one time on Center Street,—two blocks each way from where I lived; I lived next door to James E. Davidson; I guess I lived one block from where Frank T. Woodworth lived at the corner of Johnson and Center; I do not remember in what year Mr. Woodworth moved to that place; before I lived on Center Street I lived on 23rd Street; Frank Woodworth then lived next door on 23rd Street; during my residence in Bay City, I knew Frank Woodworth,—I don't know how well; I don't think I knew him when he was messenger for the Second National Bank, nor I didn't know him when he was bookkeeper of the Second National Bank; I became a stockholder in the Second

National Bank after my father's death. I inherited the stock; my other brothers inherited stock in the bank; I have been a director of that bank, way back 15 or 20 years; I have kept an account in that bank ever since I have lived in Bay City; the account of Chesbrough Brothers has been kept in that bank ever since 1902 or 1903, I think; I think the contract for the building of the steamer Kennebeck was let in the year 1901, and I was engaged in paying for the building of that boat in 1902. In connection with the building of the Kennebeck, I applied to the Second National Bank for a loan of \$50,000, but I did not get it; I don't know why I didn't get the loan, I know that I didn't get it; I guess they thought it was a pretty big line for me; I think I was a director of the bank at that time; I don't think that had anything to do with it, the fact that I was a director of the bank; I made up my mind to move away from Bay City in 1901 or 1902; I disposed of my property and business at Bay City from time to time; I had some stock in the Bay City Building Company; that company owned the Phenix block; that is the block in which the bank was situated. I sold that block in 1902; I don't think I had offered it for sale before that time. I had \$7,500 worth of stock in the building company; I don't think I had stock in the Valley Telephone Company, I think I had bonds; I sold those bonds; I don't remember what year I sold them, about that time,

289 maybe it was 1901,—about that time; it was after I had made up my mind to move to Detroit; I had stock in the Bay County Electric Company; I sold that stock; I couldn't place the date, it was around about that time; I sold those stocks through Ames; he was an insurance agent and real estate man, I would not say he was a broker; at that time, or just before then, I held stock in the National Bank of Commerce in Toledo; that was a good bank and it has been all the time since; I sold my stock in that bank; I had \$20,000 worth of stock; I sold that stock about 1903; my brother, Abraham Chesbrough, also had stock in that bank; and he also had stock in the Second National Bank of Bay City; I don't think he sold his stock in the National Bank of Commerce about the time I sold mine; I think he sold quite awhile afterwards; there was no other Toledo bank that we two held stock in at about that time; I don't recall any other stock in or bonds on Bay City property that I sold at about that time; I began to offer my house for sale, the one I built in Center Street, in 1902; I sold it in 1906, after I moved to Detroit; I am a man of a family; I went to Chicago about the first of October, 1902, and remained there all winter; I lived at the Hotel Metropole, down in Michigan Avenue; the occasion for my being in Chicago that winter was, my wife was in a hospital at Chicago; I think I returned to Bay City in May; I don't know that I remember being here about the 6th of February, 1903, I don't know that I remember that date; I don't think I returned to Bay City about the latter part of March, 1903; I haven't any recollection of coming over here from Chicago in 1902 after I went there in October.

Q. Do you remember being at a meeting of the Board of Directors

when Alvin Maltby came before the board, in the latter part of 1902?

A. No, I was not here I don't believe.

Q. The directors' minutes of November 21st, 1902, show the presence at a meeting of James E. Davidson, McGraw, Chesbrough and Cook. Do you remember that meeting?

A. No, but if I am on the record there as being at the meeting, why, I was there. With the exception of that meeting, I do not remember attending any other meeting of the board of directors of that company until about the 27th of March, 1903.

Q. Now, it is said here that Mr. Collins met you in Chicago. State the circumstances in regard to that; where did he meet you or did you meet him by appointment?

A. No.

He met me on State Street, Chicago, one morning; I was just walking down State Street; I did not know he was in Chicago, 290 nor I did not know why he was there, but he told me why;

I think there were three railroad offices that we went to, the Chicago & Northwestern, the Chicago, Milwaukee & St. Paul, and I think we went to the Michigan Central; I think I was with Mr. Collins that day; it was before lunch when I met him; he left me at night; I was with him that day; I have known Orrin Bump ever since I was a young fellow in Bay City; I knew him very well; I guess he was an A No. 1 banker and citizen; he stood very high in reputation; I guess he was the best banker in Bay City; his character for honesty, integrity, industry and attention to business was absolutely good; I have known M. N. Andrews ever since I was in Bay City; I knew him before that time as employe of the bank; he was assistant cashier of the bank eight or ten years, something like that; Mr. Andrews stood high—good—as a banker; he was supposed to be honest in every way; he was honest, I will put it that way; at that time, I had nothing to do with the employment of the clerks, agents or employes of the bank below the teller.

Q. And the board of directors appointed the president and cashier and teller.

Mr. Clark: We want to make an objection here, merely to clear up an apparent fog here; There is no attack upon any of the employes of the bank, and we think this is immaterial. We have let it in because we thought it harmless, but if we do not say anything about it some one will infer we are attacking the employes of the bank, and we are not. It is immaterial.

Mr. T. A. E. Weadock: It is not a point of attacking the employes or attacking the bank in any way——

Mr. Clark: Then it is immaterial.

The Court: I think there has been too much time spent on that subject on which there is no objection.

Mr. T. A. E. Weadock: Note an exception.

A. Yes, sir, they were.

So far as I knew all these employes were honest and competent, during all of this time; my business up to that time and in 1902,

was a manufacturer of white pine and Norway lumber; my mill and plant was situated at Emerson, Chippewa County, Michigan; when I could not get the money from the Second National Bank in connection with the Kennebec, I bonded the boat for part of
291 it; I ran vessels in connection with my business at Emerson;

I don't remember the dates, but I suppose I signed two reports to the comptroller of the currency in the year 1903, one on April 9th and the other November 17th; these two bear my signature; referring to the report of April 9th, 1903, I think, before I signed that report, it had been sworn and signed to by Mr. Andrews; I was telephoned or asked by Andrews to sign that report when I was in the bank. Sometimes I was telephoned and sometimes I was in the bank; I don't think I made an investigation of the affairs of the bank, as set forth in that report (April 9th, 1903) just before I signed it; I did not, at any time, before I was attesting any reports, prior to that time, meaning my report to the comptroller of the currency, make, prior to the signing of the report, a special examination of the affairs of the bank for the purpose of verifying the report; I don't know whether, prior to that time, any other director of that bank who attested a report, had made an examination of the affairs of the bank with reference to attesting the accuracy of the report, or not; I never saw one make one, nor I never knew of one making one.

Q. Why did you sign that report Mr. Chesbrough?

A. Why, I presume Andrews brought it before me and asked me to sign it. Always had done so.

Q. You know this report stated the loans and discounts of the bank at a certain amount?

A. Yes, sir.

I knew generally what was in that report; I knew that the loans and discounts were stated at the sum of \$985,738.34; I think I knew what the capital stock of the bank was stated at, and the stock securities and claims; I supposed this report was made up from the books of the bank; there is a record of the day's work, the day's business, kept in the bank; that day's business is supposed to be balanced at the close of the day; the daily statement would show all the business of the bank up to that time; what paper they had got on hand; how much money they had got and what business they had got and everything, and drafts and everything; what banks owed them and what they owed other banks; the different kinds of money they have on hand, whether it is gold or silver, or legal tender or National Bank notes, all these things appear in the statement; When I signed this report of the 9th of April, 1903, and it was sworn to on the 16th of April, 1903, I believed that that statement correctly reflected the condition of the bank on that day.

Q. Did you believe that the loans and discounts that you had on hand were worth, as far as anybody could estimate, the business that you had on hand, the amount listed in the statement?
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Mr. John Weadock: I object to that as leading.

The Court: Excluded.

Mr. T. A. E. Weadock: Note an exception.

The Court: He may state what he believed.

Q. Do you remember whether you signed this report at the same time that Mr. Foss signed it?

A. I don't know that.

(Witness shown report) That looks like Foss' signature just under mine, but I haven't seen it in so long that I wouldn't swear it is his; I presume it is his; at that time, Mr. Foss was a lumberman engaged in a large business in Bay City; he was a director of this bank; he took Carr's place at the bank; I don't remember whether it was,—I don't remember whose place he took; he had been a director for several years,—about eight or ten, or seven or eight; at that time I knew Mr. Foss as a lumberman about Bay City. I cannot say I knew him very well; I have sold him some lumber; he was a good business man; I don't know what his financial rating was at that time, but it was good, and his credit was good among business men; at the time I signed this report, I believed every item in the report was correct; by saying, I believed it was correct, I mean that there was nothing wrong with it.

At the time I lived on Center Street, my brother, Fremont B. Chesbrough, lived within one block of where I lived, on the opposite side of the street; there was some times confusion, on the part of third parties, with reference to my brother and myself, one being F. P. and the other F. B.; people would often get us mixed; he was also a stockholder in the bank at the time I was; he acquired his stock in the same manner that I did.

Q. Speaking of your brother in Toledo, I think I said Abraham Chesbrough. If I did, I meant Aaron Chesbrough. State whether or not, at that time, you had any communication with Aaron Chesbrough, in any manner whatever, with reference to the stock.

A. No, sir.

I heard the testimony given by S. O. Fisher here the other day; I do not remember of being on the Grand Trunk train out of Chicago on any day between the 19th and the 21st of May, 1902;

293 I never had any such conversation as Mr. Fisher testifies to, with him, on the Grand Trunk, or any other place in 1902;

I remember my stock was sold May 6th, 1902; I don't know whether F. B. Chesbrough was in Chicago in May, 1902, or about that time; I never listed my stock with G. W. Ames for sale; I never delivered any stock to Mr. Ames to be sold for me; Mr. Ames came to me one time and asked me if I would sell some stock; that was the first of May, 1903 or 1902, around there; that was right away at the time I sold my stock; I sold my stock because I was raising money; the Kennebeck cost \$180,000; the \$1000 dollars' worth of stock which I retained in the bank was my own stock; the reason I retained the amount of \$1,000 in stock, when I sold the larger part of it, Mr. Bump asked me if I would stay on the board of directors; I told him I would; that is why I kept my \$1000 of stock; Bump knew I intended to sell this stock because I went down and told him I was going to sell it; and I had some talk with him about what the stock

was worth; I think we figured it at \$150.00; he was surprised at my wanting to sell my stock; he didn't want me to sell it, I don't think; I know he didn't want me to sell my stock, because he said to me, "Why Frank, are you going to sell your stock?" I replied "Yes;" he knew why I was going to sell; he knew I was raising money; then he asked me if I would remain on the board. He asked me if I didn't want to sell all my stock; he did not tell me how much he wanted me to keep; I knew how much I would have to keep to be a director; I kept no more than sufficient to qualify me as a director, —10 shares; I kept that right along; it never went to Bump, and it wasn't his stock; he had no interest in it; I did not tell Mr. Fisher, at any time between the 19th and 21st of May, that I owned stock in the Second National Bank; I did not tell him between the 19th and 21st of May, or at any other time or times, in 1902 or 1903, that there was going to be a big depreciation in stock of the Second National Bank; I did not go to Ames about selling this stock, he came to me; the stock was sold right away after he came to me, within a couple of days,—two or three days; Ames gave me his check in payment for the stock,—for the full amount; Mr. Fisher did not say to me on the Grand Trunk, or at any other place, prior to Nov. 17th, 1903, that he did not think it looked well for a director to be selling stock; I never said to Mr. Fisher, at any time or place, that a thousand dollars stood in my name, but it belonged to Mr. Bump; that a thousand dollars of Mr. Bump's stock had been assigned to me, so that I could act as director; that never
 294 was a fact at any time; that was not assigned to me, I never held any of his stock; I did not say to Mr. Fisher, in a conversation on a Grand Trunk train, or at any place else, that there would be a big shrinkage of values in that bank.

I knew Alvin Maltby when he was in the grocery business, the wholesale firm of Maltby, Brotherton & Co.; I don't know how many years ago that was,—several years ago; they were in business down on Water street in Bay City; they done a large business I think; I don't know as I knew when he engaged in the lumber business; I think Bump opened the account in the bank with Alvin Maltby, or the Maltby Lumber Company; Orrin Bump discounted these papers in the first instance; I had nothing to do with the discounting of any of these papers of Alvin Maltby or the Maltby Lumber Company, at any time, from first to last; I was interested in no way in the business of Maltby or the Maltby Lumber Co.; I had no interest in any of these matters; except my interest in the bank,—except as I sat on the board as one of the directors; while I was absent in Chicago, there was no reports made to me from the bank, from time to time, as to the condition of the loans and discounts, or as to what was being done in the matter; I think I heard some of those letters read on the board, that have been referred to as having been received by the bank in answer to correspondence sent out by it, after the receipt of the letter of the comptroller of October 21st, 1903; I heard them read at various times; I saw or heard of the letters in reference to acceptances by different people who were buying the forest product of Maltby; those were the letters of 1898-'99 and 1900, 1901, 1902

and 1903, I wouldn't say I heard all of them; what I heard about them I heard when they were read to the board; I heard the contents of those letters from Bump or whoever presented them to the board; I don't think I was at the meeting when Mr. Maltby was called before the board in the Fall of 1902; I do not remember the Maltby inventory of October 31st, 1902; I do not remember when that was first called to my attention; I knew about the meetings with the board of directors of the attorney of the bank, Mr. Collins, and also Mr. Maltby, about the first of the year, 1903; I think I was present at one of those meetings.

Q. Do you know how you happened to be from Chicago at that time, or do you remember?

A. What time was that?

Q. About the first of the year, 1903?

A. I don't believe I was here then, the 1st of the year, 1903.

295 Q. This was about the 5th of January, 1903. What is your best recollection as to whether you were in Bay City at that time?

A. No, I don't think I was here then.

I knew about Mr. Lewis going in the office of Maltby at about the time he went into the office; I only knew, in a general way, the extent of the Maltby line of discount, in the fall of 1902; I had been assured by Mr. Bump with reference to that line of paper, that it was all right; that assurance was given me while we had frequent talks about the Maltby paper; by "we" I mean Orrin Bump and myself; sometimes I talked with him alone, or we might be at the board, or two or three might be walking up the street together; Mr. Bump assured us that there was nothing wrong with that line,—it was all right; his reason for saying it was all right was, we used to ask him about it frequently; we asked him about it frequently, because Maltby was doing a business there and we inquired about a good many things in the bank; I do not know, in figures, what the extent of the Maltby Lumber Company's business was in 1902; I know that Maltby had built up this business by personal solicitation,—he did all his own business; he was an active man; I should say, he started in business about 1904 or 1905; I do not remember when his account began in the bank,—the account of the Maltby Lumber Company; I do not know, whether Mr. Maltby, or the Maltby Lumber Co., was embarrassed in any way in the carrying on of their business, owing to the fact that they had no commercial rating; I know nothing about that; I relied on Orrin Bump in reference to that matter; I relied on him because he had the whole matter in charge.

Q. And who did the other directors rely on in reference to that matter, at the same time.

Mr. Clark: We object to that, as to what anybody else relied on.

The Court: It is excluded.

Mr. T. A. E. Weadock: We have the exception.

There was no difference in the action of myself and Mr. McGraw,

in reference to the Maltby Lumber Company, from first to last, as compared with the action of any other of the directors of the board; all of these directors lived in Bay City, during those years; they gave their attention to the business of the bank; I don't know that I was the only absentee in the winter of 1902 and 1903;

so far as I know, I was; I never had any talk of any kind
296 with Frank T. Woodworth in reference to buying my stock, nor with reference to the buying of the stock of Mr. McGraw; I never asked him to buy any stock in that bank; I don't know that any other stockholder ever asked him to buy stock in the bank; I don't know any other stockholder who asked him to buy stock in the bank.

Q. Now in reference to the transaction of the business by the board, what was their practice with reference to the business they did transact? I call your attention particularly to whether or not a matter was discussed and decided upon before a motion was offered or not?

A. Oh, yes, if we had anything to thrash out, we thrashed it out and then voted.

We thrashed it out and agreed upon it in the first place; and if it was agreed upon and action taken, then there was a record made of it; but if no action was taken, there was no record made; I did not have anything to do, at any time, with the publication of any statement or notice in the paper with reference to the accounts or reports of the Second National Bank in 1902 and 1903. I never signed any paper that was given to the printer to be printed; I never signed any paper, except the two duplicate reports,—April and November 1902 and 1903, and those were the reports that went to the comptroller of currency at Washington; I had nothing to do with the publication of the notice in the paper. I think I was here when the last dividend was ordered in 1902; I think there was a discussion about it; the board were unanimous in ordering it; I think advice of counsel was taken with reference to the dividend of 1903; counsel advised the board to pay the dividend; I think the bank had all the Maltby property as security for the Maltby Lumber Company paper in April, 1903; that consisted of timber, ties, shingles, land; I was not interested in any way in any similar line of business, neither then or at any time,—never. I don't know the amount. It was a large amount; I don't know whether Maltby had any shingle mill or not.

Q. At that time, did you believe that paper to be secured?

Objected to as leading. Sustained. Exception.

Q. State at that time, about April 9, 1903, if you believed that the Maltby Lumber Company's indebtedness to the Second National Bank was secured.

Objected to as leading.

The Court: You may answer that, yes or no, whether you thought them to be secured?

A. Yes, sir, yes, sir.

297 Q. State whether or not, about the first of January, 1903, that same year, you believed the indebtedness of the Maltby Lumber Company to the Second National Bank was secured.

A. Yes, sir.

On the 17th of November, 1903, and about that time, I believed that the indebtedness of the Maltby Lumber Co. to the Second National Bank was secured?

A. Yes, sir, the bank held as security for the Maltby indebtedness about Jan. 1st, 1903, all his property, I think; they had poles, ties, shingles, land. All kinds of forest products, and they had accounts, bills of lading and assignments.

Q. And you had had them for how long a time before?

A. You mean how long we had done business—

Q. No, I mean, how long you understood from Mr. Bump—how long before 1903, the 14 of January of that year, had you understood from Mr. Bump, that the Maltby Lumber Company line of paper was held by the bank, all these bills of lading and assignments of accounts and acceptances, by these letters?

A. Always, ever since we done business at the bank.

I think it is true that the matter of the legal form of these assignments, of the invoices for the property, had been submitted to Judge Collins and his advice taken on that matter, or about that matter—to put the matter in shape; the security was just the same, in a general way, the condition of it, in April, 1903, and it was just the same in November, 1903; I believe at any one of those times, and at any time up to the 7th day of November, 1903, that the Second National Bank was secured on the Maltby Lumber Company's indebtedness.

Q. And when you signed these two reports in April of 1903 and in November of that same year, did you believe that the loans and discounts listed in that report, so far as they included the Maltby Lumber Co. paper, was good?

Objected to as leading.

The Court: It is leading. The objection is sustained.

Mr. T. A. E. Weadock: Note an exception.

I did not sign the report of the 6th of February, 1903; I was not here on the 6th of February, 1903; I signed the report of the 9th of April, 1903; I did not sign the report of June 9th, 1903; I did not sign the report of the 9th of September, 1903.

On the 9th of April, 1903, or about that time, I understood "Loans & Discounts" as stated in that report, to include all
298 the paper in the bank; I do not remember the amount of it aside from the report, nor I do not remember about the amount of it so that I could recall—I do not believe I remember the amount of the capital stock at that time; I do not remember the amount of the surplus fund in a general way; I do not remember reading the report as to these items; I never checked those items over; I never read any of the reports through; I didn't read

this report because I haven't any special reason for reading it; I was attesting it as correct.

Q. Why did you attest it as correct?

The Court: That is excluded as being answered at least three times.

Mr. Weadock: Very good, I will ask you the same questions, if I have not already asked them with reference to the report of Nov. 17th, 1903?

A. Just the same.

I don't think I knew anything of the movement on the part of some of the stockholders of the Second National Bank and Mr. Woodworth to acquire control of the Second National Bank, and change the management of the bank; I can't say that I knew anything of a movement to defeat Mr. McGraw from re-election to the board in 1903, or in 1902; he was defeated in 1905; I had no talk with Mr. Bump about the Maltby Lumber Company's reducing its line at the bank, with reference to his requiring Mr. Maltby to reduce the line of discount; I think we got orders to reduce it, if I remember right; we got orders from the comptroller; I knew that the railroad companies would not accept drafts made on them for ties and poles and forest products sent to them; I knew they did not accept drafts; they paid the bank direct for products sent to them; they paid when they checked up the goods that they received; they paid their own way, not the way the Maltby Lumber Company and the bank wanted it done; this report that goes to the comptroller is made up from the daily statement, I think; this collateral which Mr. Bump held in the bank for this Maltby line of paper, I had heard it read off the books, prior to the Fall of 1902; I mean, the list was read off from the discount register; the actual drafts, inspection certificates, assignments and so on, were not produced by Mr. Bump before the board at each meeting; I don't believe I was at the meeting of November 21st, and do not know what Mr. Maltby may have said at that meeting with reference to his affairs; I don't believe I ever saw his inventory of October 31st, 1902; I don't know why this paper of Maltby or the Maltby Lumber Company was not charged off the books prior to 1903, November 17th; I never offered a resolution to charge it off; I don't know of anybody else on the board offering a
299 resolution to charge it off; paper is charged off by the board of directors when the bank examiner orders it; so far as I know, all this paper in the bank was kept alive at the time; I — know whether or not interest was paid.

Q. Now, if you can, you may state why you didn't charge off this paper or any part of it.

Objected to as incompetent, irrelevant and immaterial, and because it has already been asked and answered.

The Court: I will let him answer it once more.

A. I will answer that by saying it wasn't uncollectible paper.

These reports that I signed, were signed and sworn to by Mr.

Andrews before I signed them; the board was always unanimous in reference to the various phases of the business about the Maltby paper; I never made any statement, either directly or indirectly, orally or written, to Mr. Woodworth, the plaintiff, about the Second National Bank stock; the Second National Bank had paid dividends for a long time prior to November 21st 1903.

Q. At this time I desire to offer in evidence the statement of the dividends of this bank found on page 406 of the printed record. It is agreed to by counsel.

The Court: Very well.

Mr. Weadock: There is one that comes within my objection.

Mr. Clark: We will put it in now.

The Court: I will permit the plaintiff to put it in at this time, so that it may be consecutive. You may have the exception.

Mr. T. A. E. Weadock: I will take the exception.

Q. Did you believe those lines to be good?

A. I did, yes, sir.

Cross-examination.

By Mr. John Weadock:

I knew Mr. Orrin Bump very well; we were good friends.

Q. He left the bank and resigned in November 1902.

Mr. T. A. E. Weadock: I want to call your Honor's attention to the fact that that has been testified to over and over again, and there is no question about it.

The Court: I will permit it on cross examination.

300 A. Yes, sir.

He had not given very much attention to the business of the bank for some time prior, I don't know how long prior; I don't know that he had not from the early part of the year 1902,—as early as June; I should say, two or three months prior to his resignation; it seems to me he went away on his vacation; these conversations that I have testified to as having had with Mr. Orrin Bump occurred prior to his going away on that vacation; I saw him almost every day; I can't answer as to how long prior to his going away on a vacation that I discussed with him the Maltby line,—for at least a year; I would say that we commenced discussing the Maltby line in 1901, I should say in 1902; if he left two or three months before Nov. 7th, 1902, and I discussed matters with him for a period of a year, that would carry me back to 1901; so it was in 1901 and 1902; I don't know that I complained to Mr. Bump about the size of the line; I thought it was large; I don't think I called Mr. Bump's attention to the fact that that line of paper amounted to more than the capital stock and surplus of the bank; I called his attention to the fact that it was large; I told him that I thought it was too large; I don't think there was any question that it was large, and I made him understand that I thought it was large; I don't know as to whether there was any

room for a misunderstanding about it, whenever I happened to be in town I attended meetings, from time to time, in 1902, down to my going to Chicago; during the time I was in Chicago, owing to my wife's illness, I don't think I returned from Chicago to Bay City, from time to time; I mean to say that I was not in Bay City, from time to time, after 1902 and before March, 1903; I might have been here more than once; I don't think I was in Bay City more than once; I went right to Chicago and lived there that winter; I wasn't here; I don't believe I was here.

Q. I am asking you to be either positive or say you don't remember.

A. Well, I don't remember of being here.

Q. Well, when did you determine to reduce the Maltby line?

Mr. T. A. E. Weadock: Objected to as incompetent.

Q. Well, you or the board. When did you first determine to reduce the Maltby line?

A. When our attention was called to the excessive line
301 by the comptroller of the currency.

I don't think we determined before that; I don't remember of having seen the letters of Mr. Andrews offered in evidence, dated Oct. 21st, 1902, in which he states to Mr. Bump that the comptroller had made some complaint about this paper and, as a matter of fact had been reducing the paper for more than six months. And they had reduced it from June, 1902 to October, 1902, to the extent of \$62,000; we commenced reducing the paper in June, 1902; I am not undertaking to be positive about any of these dates; having had my attention called to that letter, I do not now say that it was as early as June, 1902, when we commenced reducing the line, but if that letter is that early, it was; I would not say that in June 1902, I was familiar with the entire line of the Maltby paper; Mr. Maltby had paper discounted at the bank; it is true that when the paper was discounted at the bank, it was reported to the board of directors, and it is also true that the paper was approved by the regular weekly meetings; and when the paper was renewed, the renewal paper was reported in the same way and approved by the directors; and every one of those meetings at which I attended and my attendance is shown by the record in the evidence, I voted in favor of approval of that paper, and I knew just what there was behind the paper; and I knew that behind this paper were certain so called bills of lading and inspector's certificates; I don't remember that they kept the Maltby line of paper separate in this red box all the time; the discounts were read from time to time before the board of directors; the papers themselves were not always produced before the board every time; if the directors wanted to look at them they were produced; if I was on the committee I made an examination of the bank in 1902; I don't remember whether I was on the committee in 1902 or not; I was here a good part of the time; I will not say that I did not make an examination; it depends on what part of the examination I was on, whether I saw all these papers; when I was on the committee, sometimes I took home bills,

and some times cash. Some times foreign bills; when I took foreign bills or home bills, I went through the bills and checked them off; the bookkeeper in the bank did not make up a statement of the bills and lay the statement before us to check off, we took all the bills and checked them from the discount register; I know if a bill was there and the amount; I think it is right, that in June, 1902, I knew what there was attached to the several papers that went to make up the Maltby line of paper, and was in the
302 Old Second National Bank; I don't think I question that.

Q. And you knew it from that time on?

A. Yes, sir.

Mr. T. A. E. Weadock: I move to strike that out, because the question assumes that the witness knew what drafts and bills of lading and certificates were attached to the Maltby line.

Motion denied; exception.

I sold my stock in May, 1902.

Q. Whatever examination you made of the assets of the Old Second National Bank in the year 1902, was made before June 1st, was it not?

A. I think the examination of the bank was usually in June and December.

Q. As a matter of fact, wasn't the bank usually examined in May and November?

Mr. T. A. E. Weadock: I object to what was usually done. The question is, what was done at this time.

Objection overruled; exception.

A. No, I don't recollect.

I did not meet Spencer O. Fisher on the Grand Trunk train in 1902, coming from Chicago to Bay City; I say that I never met Mr. Fisher in May, 1902, on the Grand Trunk train, coming from Chicago to Bay City; I did not testify on the last trial that I met him.

Q. Did you deny on the last trial of this case that you met him?

A. I have no recollection of what I testified to on the last trial. I have not read it.

Q. You have no recollection in relation to what you said on the last trial of this case about Mr. Fisher's testimony?

A. No, I have not read over my testimony.

Q. Wasn't the extent you went to at that time that you didn't remember whether you met him or not, or didn't remember what he said?

A. No, sir.

Mr. Humphrey: I submit, the testimony given on the former trial, should be read.

Q. I will read from page 447 of the record: "Q. Do you remember of seeing Mr. Fisher in either 1902 or 1903, on the train
303 running from Chicago? A. I saw Mr. Fisher, but I don't know what year it was. Q. Did you ever see him coming from Chicago on the train but once? A. No, I don't think I did. Q.

State whether or not you made any such statement to him as he testified you did when he gave his testimony in this case? A. I cannot recall any such statement Mr. Fisher made. Q. Nor that you made to him? A. No, sir. Q. Do you remember what you were talking about? A. We talked about social affairs, and some horses we had bought over in Chicago." Now what do you say as to whether or not you talked with Mr. Fisher on the train coming from Chicago?

A. I will say, I haven't any recollection of talking with Mr. Fisher on the Grand Trunk train.

Q. Do you say you did not talk with him on the Grand Trunk train coming from Chicago?

A. Yes, sir. I will say that.

Q. What did you mean when you testified in the last case you did talk with him on the train from Chicago about social affairs?

A. I have no recollection of that.

I have no recollection either of giving that testimony or of having the talk, that is my position; in the face of that testimony, I will say I have no recollection of being on the train with Fisher; I will say I didn't have any talk with Mr. Fisher on a train; I don't believe this testimony is true; I don't know what I testified to at that time; I did not intend to give testimony that was not true; I made a sale of my stock in May, 1902; Mr. Ames spoke to me about making a sale and I then determined I would sell and I went up to the Second National Bank and told Mr. Bump I was going to sell; I then intended to sell every dollar of stock I had in the bank; and it is true that it was only because Mr. Bump asked me to stay on the board that I retained a thousand dollars of the stock, and did sell the balance.

Q. It was your desire to get out?

A. To get rid of all of it; I wanted to sell that stock and my recollection is that I sold it for \$150; I didn't then know who got it, but I do now; I think my neighbor Charley Whitney got it.

Q. And at that time the Old Second National Bank had this entire Maltby line and had absolutely no security outside of whatever security was afforded by the papers that are attached to the drafts and in the bank, and now in that red box?

Mr. T. A. E. Weadock: That is objected to, as it assumes a statement that is not correct under the evidence. (Question read.)

304 The Court: He may answer.
Exception.

A. I don't know the bank had absolutely no security.

Q. What other security, if any, did the bank have at that time?

A. It had the Maltby property.

Q. Have in mind the time; this is May, 1902,—what other security did the bank have at the time you sold your stock? What other security than the papers attached to these drafts did the bank have for the Maltby line in either May or June, 1902?

A. I guess, no other.

I believe I knew that at that time; I guess it is right, that I have been a director of this bank for all these years and I understood that all of the paper that was carried on the books of the bank among the live bills, was reflected in the book known as the daily statement; the paper that was carried as an asset of the bank was so entered in the books, that it would be carried to the daily statement as being an assets of the bank, and at the amount at which it was discounted.

As to the Maltby line being carried at its face and the discount being paid in cash, I don't know how the discount was paid; I don't believe I knew that the draft did not draw into it; that had been the way in which the business of the bank had been carried on for a number of years, prior to 1902; and that was the way it continued to be carried on for a long time since I was connected with the bank.

Q. And during all the time you knew when a paper was approved by the directors and carried among the Loans & Discounts, it would appear as being carried in that daily statement as a part of the gross sum mentioned in the daily statement?

Mr. Humphrey: I object to that. I ask, if counsel is going to testify in this case, that he be sworn.

The Court: That is one of the privileges of cross-examination. Exception.

(Question read.)

A. I think that is right.

I understand that; I guess all the paper he had in the bank, this entire Maltby line was carried among the loans and discounts, during all the time I was a director of that bank; there was some charged off at one time, I don't know when; I don't think any of it had been charged off up to the close of the year 1903; I don't know that none of it had been charged off up to the close of 1904; I don't know that
305 it was charged off either January or February, 1905, at the time the capital stock of the bank was reduced; I think I knew it was charged off at the time the capital stock of the bank was reduced.

Q. You also knew, during all these six years, including the year 1903, that statements would be called for by the comptroller of the currency of the condition of the bank on certain specified days.

Mr. Humphrey: That is objected to as being a statement by the counsel and is not a question.

The Court: The objection is overruled. The witness understands it is a question. You may answer.

(Question read.)

A. Yes, sir.

Q. You knew there would be five statements called for during the year 1903, did you not?

Mr. Humphrey: I object to that and I want an exception to all this mode of examination by the counsel, making these charges without asking any questions. I desire an exception to all of them.

The Court: You may have the exception.

A. I don't know whether it called for five, or three or two.

Q. But you knew that statement would be called for by the comptroller?

Objected to as immaterial.

A. Yes, sir.

I knew that when this statement was called for, it would be made out by different officers of the bank and signed by directors and reports made to the comptroller; I don't know that I knew that the facts contained in the statement, or a short statement, would be published in the daily press in the city; I knew it generally was; I won't say that I knew it always was.

Q. Didn't you know that the requirement of the comptroller was that you should attach to that report a piece of the paper cut from the newspaper upon which was advertised the report. You knew that, did you not?

Objected to as immaterial, incompetent and irrelevant. Overruled. Exception.

A. I do now, but I had forgotten at that time; it is so long since I have made out a report or signed one, that I have forgotten all about that.

Mr. Humphrey: This is a requirement of the law, and it is not a part of the report, and I object to it.

Objection overruled. Exception.

Q. So that in the year 1902, and prior to that, you knew
306 that by the system of carrying on the business of the Old Second National Bank, when paper was carried in loans and discounts, it would be reflected and reported in the notice of the condition of the bank, published in the public press and in the report made by the officers of the bank to the comptroller of the currency.

Mr. Humphrey: That is objected to as incompetent, because it contains several questions and it has already been asked and answered.

Objection overruled. Exception.

A. Yes, I knew that.

As to the publications of these statement-, I knew all the time, they might be called for, and called for by the comptroller over my name or over the name of the other directors; and I knew they would be published over the name of three directors and they might be my name and they might be mine and somebody else's.

Q. I want to read a few questions from page 487 of the record of the former trial that were answered by you. "Q. And why did you think that line was too large, or just large enough; what was your reason for that? Wasn't the Michigan Central Railroad good for any amount? A. I thought Maltby was getting too much of it in the bank; taking too much out of the bank and having probably

what other people wanted to borrow. I told Mr. Bump I thought he was putting too much of that paper in the bank. I told him he wanted to reduce it, and he said he would reduce it, and he did undertake to reduce it during the six months up to June, 1902; he reduced it some \$60,000; I urged him to continue reducing it; I talked with him about the reduction a great many times, and I told him it was too much. About June, 1902, I knew the bank had more than \$402,000 of the Maltby line on the books." Is that a correct statement of your recollection, Mr. Chesbrough?

A. I guess that is right.

Q. Continuing at the bottom of page 487. "Q. You knew at that time that those papers, when they matured, were being renewed, or other paper being substituted for them by Mr. Maltby, drawn the same way the old papers had been drawn, and simply put in the place of the old paper in the bank? A. Yes, sir. Q. And that the new papers drawn were not forwarded to the railroad company for acceptance? A. No, I don't know that." Was that testimony given by you?

A. I think so.

Q. Now, as a matter of fact, you did know that the drafts were not forwarded for acceptance, did you not?

A. I guess that is right. I did know.

307 I said on my direct examination, that I sold my stock in the Old Second National Bank because I contemplated moving from Bay City; the reason I sold my stock in the Old Second National Bank was, because I needed the money.

Q. Did you sell your stock in the Old Second National Bank because you were going to move from Bay City?

A. I sold my stock in the Old Second National Bank because I wanted the money.

Q. I want you to answer that question, yes or no. Did you sell your stock in the Old Second National Bank because you were considering moving from the city?

A. No.

Q. What did you mean when you testified on your direct examination that was the reason, simply because Mr. Weadock put it in his question and you let it go at that?

A. I don't remember about that.

My removal from Bay City affected me in relation to the sale of my Old Second National Bank stock, it affected the sale of all my property here, but it did — affect the sale of my bank stock.

Q. Why could not you keep your stock, even if you did move out of the city?

Objected to as incompetent. Overruled. Exception.

A. I didn't want it, if I was not going to be here.

That was the same reason I sold my Valley Railroad bonds; I could keep the Valley Telephone bonds just the same if I moved to Detroit; I would not say that that was the reason I sold my stock in the Toledo Bank, because I was going to move to Detroit; when I

contemplated moving to Detroit, I did not sell all my stock, but kept \$1,000 of it because Bump asked me to remain on the board.

Q. And you didn't want your going off the board to be criticised?

Objected to as incompetent. Overruled. Exception.

A. No. I wouldn't say that.

I don't think that had any bearing in my mind; I would not say that I was dissatisfied with the Maltby line at that time; I did not know, at that time, that the Maltby line wasn't good; I regarded it as being good.

Q. Do you say to this jury, that you regarded the Maltby line as good?

Objected to.

Q. Do you say now, that at that time when you sold your stock 1902, you knew the Maltby line was good?

A. I didn't know it was bad.

I thought it was good; that was my judgment as a business man; I did not know that Maltby had no personal responsibility; I do not recollect that the Old Second National Bank had lost considerable money on Mr. Maltby just prior to that.

308 Q. Now, on the paper of A. Mosher & Son, endorsed by Maltby, and you knew that on the paper of the Seattle Lumber Co., endorsed by Maltby, you knew the Old Second National Bank had lost \$100,000, did you not?

A. No, I don't recollect that—

Objected to as incompetent. Overruled. Exception.

A. No, sir, I don't recollect that.

I do not recall that I knew it had made a large loss on that kind of paper; the Mosier failure was not plain to me; I don't think it was then; I don't think I knew then that Maltby had failed in business in 1902; I don't recollect that he had failed at the same time Mosier failed in 1895, and had been doing business at that time in the name of his wife; I don't know that he was doing business in the name of his wife and in the name of the Maltby Lumber Company; I cannot say that I knew that the Maltby Lumber Company was Alvin Maltby and his wife; I cannot say that I knew that Alzina Maltby was his partner; I don't believe that I knew that the Maltby Lumber Company was simply a trade name for Mrs. Maltby; I did not know it in 1901 or 1902; I believe that I recollect now that it was Alzina Maltby; I remember of testifying on direct examination in relation to the fact that people sometimes confuse F. B. Chesbrough with myself.

Q. Did you intend by that testimony to create the impression that Mr. Fisher had confused you with your brother?

Objected to. Overruled. Exception.

A. No, sir.

Q. You didn't have any such idea in mind?

Same objection. Ruling. Exception.

A. No, sir.

Mr. Fisher knew me; I wouldn't say that he knew me as Frank; I don't think I had the idea that Mr. Fisher had mistaken me with Fremont; I had no arrangement with Orrin Bump in relation to this \$1,000 of stock that I kept that he would stand good for that stock and take it off my hands; there was no talk of that kind; I simply stayed in with \$1,000 of stock out of personal consideration for Mr. Bump; and I continued to discharge the duties of my office as director of the bank after that; I will say that I went to Chicago in the year 1902 about the 1st of October and it is my best recollection that I was not here thereafter.

Q. The original minutes of November 21st, 1902, of the directors' meeting reads as follows: "Regular meeting of directors this 11:30 a. m. Present James E. Davidson, McGraw, Chesbrough, Cook. Minutes of last meeting read and approved. Discount 309 to date also read and approved." Now, what do you say as to whether you were here in November, 1902?

A. Is that the genuine minutes of the bank?

Q. You would not think I would read anything else?

A. Then I would say I was here.

Q. Look at it and make sure.

A. Yes, it says "Chesbrough."

Q. You were the only Chesbrough on the board at that time, were you not?

A. Well A. M. Chesbrough was a director at one time.

I don't know that he was not a director then; I don't know that he was not; I don't know that whenever the word "Chesbrough" is used in the minutes, it always means me, and if anybody else by that name was meant, it was written with the other man's initials; Aaron Chesbrough was not a member of the board.

Q. No other Chesbrough, except you was a member of the board at that time?

A. Then I was there.

Q. Then you were mistaken about your not being here in October, 1902. Now, at this meeting in November, 1902, wasn't there submitted to the board of directors a statement including an inventory of the Maltby property?

A. I don't know.

Q. Which statement and inventory purported to bear date Oct. 31st, 1902?

A. I don't remember that.

Q. You were examined on this subject on the last trial?

A. I don't know.

Q. I will read the testimony from the original minutes: "Q. Take it in October, 1902, were you in Bay City? A. Until the latter part." That is correct, is it?

A. All right.

Q. "Q. Some time in 1902 didn't you get a statement from Mr. Maltby and have Mr. Maltby before the board of directors at a meeting at which you were present? A. I don't recollect. Q. I call your attention to a meeting of Nov. 21st, 1902, if you have any

date that will help you to fix it, look at it? A. I don't think I was here in November 21st, 1902. Q. These records are always right, aren't they? A. I think they are. Q. I will read that day. It is in evidence. 'Nov. 21st, 1902, regular meeting of the board of directors, this 11:30 A. M. Present, James E. Davidson, McGraw, Chesbrough, Cook——.' A. Then I will own the corn if I was there. (Reading further testimony.) Now, after having your recollection refreshed, what do you say as to whether or not you were here on Nov. 21st, 1902, and whether at that time the inventory of Mr. Maltby's property was presented to you and you examined it, and the board determined then to put Mr. Lewis in the office?

310 A. I think that is right.

Q. Now, at about this time, you knew the Second National Bank took steps to determine what the different companies were actually owing Maltby, did you not?

A. I don't know whether it was at that time or not.

I remember when Mr. Collins was in Chicago, that was in December, 1902; I think that is right that I knew that was part of that investigation that was being carried on in pursuance of this policy that had been decided on by the board of directors; I don't recollect that I knew Mr. McGraw was to go out and make investigations for the purpose of determining what property the Maltby Lumber Co. had; I knew that McGraw was ordered to go out.

Q. You understood it, did you not, at the time?

A. Was I present at that meeting when those instructions were given?

Q. I don't know?

A. And I don't know.

Q. Don't you know at the time that examination was made that you were in touch with the situation and knew that Mr. McGraw was inquiring into what property the Maltby Lumber Co. actually had?

A. I don't know that I knew that. McGraw was sent out.

I don't know that I knew he had gone out, or that he had made a report on the conditions he found; I don't believe I ever saw Mr. McGraw's report until—; when Mr. Collins met me in Chicago and I spent that day with him, I think he told me he was ascertaining how much and how big the contracts were with the railroads, and when they were receiving ties, and where; I don't know as to whether he mentioned what the companies owed Maltby. I don't think they knew; possibly I had anxiety about the situation at that time.

Q. There is no question about that, you did have anxiety at that time about the situation, didn't you?

Objected to as incompetent. Overruled; exception.

A. You mean, I was afraid about it?

Q. I mean just what I say: You were anxious about the line?

A. Well, anxious, yes, I might be.

I went with Mr. Collins to three railroad companies, I think; I don't think that we found out that Mr. Maltby had misrepresented the situation, Mr. Collins might have, but I don't think I did; I don't

think that Mr. Collins told me that Maltby had misrepresented the situation.

Q. You found out and knew at that time that the Maltby drafts held by the Old Second National Bank against the companies amounted to more than the companies admitted they were owing to Maltby, did you not?

311 Objected to as incompetent; overruled; exception.

A. I don't think the companies admitted that. My recollection of what we found in Chicago is, that the companies did not give us much information. You could not find out how much the companies owed Maltby. That is my recollection.

I don't know as to whether that affected me and I was considerably exercised to find out that fact; I knew that the board of directors had put Mr. Lewis in the Maltby office as an employe of the bank.

Q. He was there representing the bank, but ostensibly as an employe of the Maltby Lumber Co.?

Same objection; overruled; exception.

Q. You knew that?

A. I knew that Lewis was in the office.

Q. And you knew he was to be held out as an employe of the Maltby Lumber Company, and not as employe of the Old National Bank?

Same objection, ruling and exception.

A. No, I cannot say I knew that.

Q. At that time, do you mean you wanted the public to know that Mr. Lewis was in that office representing the Old Second National Bank?

A. I don't know as we were asked anything about what the public thought.

Q. Take it yourself. You didn't want the public at that time to know that the Old Second National Bank had more than \$400,000 of Maltby Lumber Co. paper did you?

A. I didn't care about that.

Q. You didn't want the public to know that fact, did you?

A. No, I won't say that.

Q. Would you just as leave the public should know that, then?

A. Yes, sir.

Q. You would?

A. Yes, sir.

312 Q. Now Mr. Chesbrough, when was the first security of any kind taken from the Maltby Lumber Company other than and apart from these drafts that are in the red box?

Mr. Humphrey: Do you include all that was attached to the drafts in that question?

Q. All that was attached to the drafts within the red box. When was the first security taken, so far as you know?

A. When Maltby turned over all his property to the bank.

I don't remember when that was; I guess I knew of this paper being taken in January, 1903; when I signed the statement of April, 1903, I knew the exact situation in relation to the Maltby line; and I knew that all that paper was carried by the bank good as at its full face value; and knowing that I signed the report to the comptroller; I then believed that entire line of paper was secured; I believed that entire line of paper was good; I believed that the Old Second National Bank would not lose anything on that line of paper; I don't mean to say that I believed it would get every dollar of it,—practically every dollar; I signed the statement because I was asked to; I signed the statement in order to attest to the public that the Old Second National Bank had the amount of loans and discounts that was mentioned in the paper.

Q. Up to this time has it not been your position that you had a right to sign the statement simply because it was a correct statement of the books, regardless of the value of the paper?

Mr. T. A. E. Weadock: I object to that as incompetent, irrelevant and immaterial, not proper cross examination, and a matter of law.

The Court: What is the exact question?

Q. Your position has always been that you had a right to sign that statement simply because it was sworn to by the cashier, Mr. Andrews, and your position had no reference at all as to whether the paper was good or bad?

Mr. T. A. E. Weadock: There is no such thing as a position of the witness. He gave his testimony or he did not. If he gave testimony, his attention should be called to it. And the gentleman confuses the position of the counsel with the testimony of the witness. Counsel will take the position for him.

The Court: The objection is sustained. You may ask him whether or not you have so stated to any one.

313 Q. Didn't you testify on the trial of this case before that you considered you were right in signing that report, simply because, and only because, it had been sworn to by Mr. Andrews, and it was correct according to the books?

Mr. T. A. E. Weadock: That is objected to as incompetent. The testimony should first be read to the witness.

Overruled; exception for defendants.

A. I don't know what I testified to before.

Q. You sat here and heard all the testimony given on both trials of this case, have you not, practically all of it?

A. Well, I don't think I was here and heard all the testimony.

Q. You have heard a large part of it?

A. I don't know as I heard all of it before.

Q. You heard counsel arguing the case to the court, from time to time.

A. Yes, sir.

Q. You know, Mr. Chesbrough, do you not, that it was your position, and your counsel's position, stated in your presence in this

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court, that you had a right to sign that report, simply because Mr. Andrews had sworn to it, and because it was correct according to the books, regardless whether the paper was good or bad?

Mr. T. A. E. Weadock: That is objected to as incompetent and not proper cross-examination, and because it is a statement and not a question, and it involves matters of law and not matters of fact.

Mr. Humphrey: I want the court to say to the jury that was an improper statement to make to the jury or in their presence.

The Court: I don't think it called for any criticism from the court. I will sustain the objection.

Q. What attention did you give to this Maltby line after the 1st of January, 1903?

Mr. T. A. E. Weadock: That is objected to as incompetent, irrelevant and immaterial.

Overruled; exception for defendant.

A. I don't believe I remember how much attention was given to it.

Q. You mean to say, you don't know what attention you gave to it?

A. Well——

314 Q. What attention did you give to it?

A. While I stayed on the board I heard it read and approved whenever I was there.

I don't remember what else; may be I was vice president of that bank at that time; I cannot tell you any other attention I gave this paper during the year 1902 or 1903 than I have already stated; I knew the line was there; I saw it from time to time.

Q. I will read some testimony you gave on the last trial, reading from page 493: "Q. Do you remember of seeing all this Maltby line of paper? A. Yes, sir. Q. Time and time again? A. Yes, I have seen it. Q. During the year 1902? A. Some time during 1902, yes, sir. Q. And also 1903? A. After I was here, yes sir. Q. The matter of this Maltby Lumber Co. obligation, and the Maltby line as you term it, was a matter of common discussion between you and the other directors whenever you met, was it not? A. After October, 1902, I think it was."

Q. Do you remember giving that testimony?

A. Yes, sir.

Q. And also: "Q. And you had some discussion before that time and after that time, after October, 1902. It was a matter of constant discussion? A. I think we did attend to it all the time."

Q. You remember giving that testimony?

A. Yes, sir.

Q. What did you do in attending to it all the time?

A. I was present at all discussions on the board. That is what I meant.

Q. That testimony just read is correct, is it not?

A. Yes, sir.

Mr. Weadock: I object, and I want to call attention to the fact:

He first inquires about what the board did; discussions on the board, then he asks him: "What did you do in attending to it all the time?"

The Court: The objection is overruled.
Exception.

I cannot tell you anything else; I have told you everything I did that I can recollect: I think the same condition continued, except for the amount of reductions that were made, so far as this Maltby line is concerned, down to November, 1903, when I signed another statement; I signed that statement of November 17th, 1903. Whatever there was in the bank of the Maltby line was continued at 315 its full face value among the papers of the bank, the loans and discounts, at that time: I knew that the statement I signed was required to be a true statement of the conditions of the bank.

Q. And you knew no paper should be carried as paper, as loans and discounts, unless that paper was good?

A. Yes, sir.

I signed that statement; and I now say I then believed the Maltby line was good,—reasonably good, as late as November, 1903; I don't know when that reasonableness attracted my attention and became my judgment.

Q. When, between April, when you say it was good, and November, when you say it was reasonably good, did you change your mind and make it up to the effect that it was reasonably good.

A. I don't think I changed my mind. My mind was practically just the same both times.

Q. When did you find out the paper was bad?

A. I don't believe I can answer that.

Q. You did find out it was bad, didn't you?

Objected to as incompetent, irrelevant and immaterial, and not proper cross examination. Overruled, exception.

A. I don't remember?

Q. But at the same time, you did find out it was bad?

A. Some of it.

Q. To what extent?

Same objection, ruling and exception.

A. I don't remember.

Q. You found out it was bad to the extent of over \$225,000 did you not?

Objected to as incompetent and improper cross examination.
Overruled; exception for defendants.

A. I wouldn't say I did.

Q. You charged off over \$200,000 of paper as bad while you were in the bank.

Same objection, ruling and exception.

A. Was I a director when that was charged off?

Q. You were a director in 1905, were you not?

A. I don't remember.

Q. Were you a director when it was charged off?

A. I don't remember whether I was or not.

Q. Is that all the attention you paid to it?

A. I don't remember.

Q. Now, your counsel was asking you in relation to November 21st, 1902. I think that was the date. He asked you why this paper was not charged off, and you answered you didn't know why.

Mr. T. A. E. Weadock: I didn't ask him in regard to that date.

Q. Whatever the date was, do you remember that question asked of you?

A. No, I don't.

He asked so many questions, I can't remember my counsel today asking me why that paper was (not) charged off; it was not charged off because it was not ordered charged off; it was not ordered charged off by the comptroller of the currency; that is not the only reason. I wouldn't say that I felt we were at liberty to carry paper as long as it was not ordered charged off by the comptroller of the currency; in my judgment, paper is charged off when it is uncollectible, then only; it was my belief and judgment, as a business man, all the time when I made these several reports, that that paper was not bad and that it was collectible,—at the time I made each and every one of these reports.

Q. And at the time the other directors made reports that you knew the paper was not dead as long as the paper was carried in the loans and discounts?

Objected to as incompetent and immaterial; overruled; exception.

A. Yes, sir.

Q. Have you at any time, or did you at any time, in the other trial in this case testify, that you considered the paper good, or believed the paper good?

A. I don't know what I testified to.

Q. You have found out since the other trial it was necessary, in order for you to succeed in this case, for you to show that at that time you did believe the paper was good, haven't you?

Mr. T. A. E. Weadock: That is objected to as incompetent, not proper cross examination, and as a question of law. It is no part of the direct examination, and for other reasons, it is incompetent.

Objection overruled; exception for defendants.

(Question read.)

A. I would not say that.

I have never read the opinion of the court of appeals; I don't believe I have heard it stated, all of it.

Q. Now, you continued with the bank as a director during the year 1904, did you not?

A. I don't know how long.

Q. Don't the record show?

A. Yes, sir.

Q. And it is right?

A. Yes, sir.

317 Q. And you carried this same paper at its full face value during the entire year of 1904, on the books of the Old Second National Bank?

A. I think we did.

Mr. T. A. E. Weadock: I object to this as incompetent, not proper cross examination under the declaration, and as incompetent and immaterial to the issue that is in this case.

Overruled; exception for defendants.

A. I think we did.

Mr. Humphrey: Does your Honor hold in this case, that what happened in 1904, can be taken into consideration by this jury, on this question?

Mr. John Weadock: We are not claiming any probative force for what occurred in 1904, except as a part of the cross examination of this witness. I submit it is entirely proper cross examination.

Mr. Humphrey: We are not trying what took place in 1904, and it is not proper cross examination, and the jury have no right to consider it, and it has no right to be in evidence before the jury.

Mr. Clark: We do not claim any liability as to what he did in 1904. It simply goes to the credibility of the witness.

The Court: The objection is overruled.

Mr. Humphrey: Note an exception.

The Court: It is admitted as bearing on the credibility of the witness.

Mr. Humphrey: Exception.

The Court: And is his answer relative to his belief as to the value of the claim in 1903?

Mr. Humphrey: I will state a further reason in support of my last objection, that neither one director nor two directors, could charge off any paper. It is for the board of directors to do that.

Overruled; exception.

318 Redirect examination.

By Mr. T. A. E. Weadock:

Q. Is that your signature to the report of May 29, 1902?

A. Yes, sir. (Paper marked Exhibit 243.)

Q. I call your attention to the stock ledger which is in evidence, showing Mr. Chesbrough's stock was sold on the 6th of May, 1902.

No objection.

The Court: It is admitted.

Mr. T. A. E. Weadock: Exhibit 243 is as follows: (Reading.) "Old Second National Bank, Bay City, Michigan, May 29, 1902. We, the undersigned, in a committee of the whole of the board of directors of the Old Second National Bank at Bay City, Michigan, hereby certify, that we examined the assets and liabilities of the bank and

found them to correspond with the statement at the close of the business on May 29th, 1902, with the exception of the item of cash, which was over \$.48; also bills in transit, which were over \$40.56. A. J. Cook, J. W. McGraw, E. B. Foss, F. P. Chesbrough, May 9th, Omar \$3,537 paid and not marked off. May 28th, Tawas \$10 paid and not marked off." Is this in the handwriting of Orrin Bump, that line at the bottom, or do you know whose it is?

A. That looks like Bump's writing.

Q. Is the endorsement on the back of that report in the handwriting of Orrin Bump?

A. Yes, sir.

Mr. T. A. E. Weadock: I offer in evidence the minutes of the meeting of May 31st, 1902.

No objection.

"Regular meeting of the board of directors this eleven o'clock A. M. Present, Bump, James E. Davidson, Cook and McGraw. Minutes of last meeting read and approved. Discounts to date read and approved. On motion, report of the committee of the whole of the board of directors on examination of the assets and liabilities of the Old Second National Bank of Bay City was accepted and placed on file." That is all.

Recross-examination.

By Mr. John Weadock:

Q. Did you know, when you were being examined a little while ago, when I asked you whether you made the examination of the Old Second National Bank, along in May, 1902, and whether the examinations were not made in May and in November, and you said you thought in June, I asked you whether you knew of
319 the existence of that paper?

A. No, sir.

I first seen that paper right here,—right now; I did not know of its existence before, until I heard it read; and I knew it was certified and signed by me as to the papers in the bank agreeing with the books of the bank.

Q. And in May, 1902, all this Maltby line of paper which is now in that red box and produced here, was examined by you personally?

Mr. T. A. E. Weadock: That is objected to, because only a small part of the material is dated in 1902, and the counsel wants to know that in asking the question.

Mr. John Weadock: I submit the question is right.

Mr. T. A. E. Weadock: I submit it is not right. It is unfair, illegal in every way.

Mr. Humphrey: None of that paper is dated in 1902.

Q. You knew when you made that examination, in 1902, that you saw every single paper that was contained in the Maltby line which was then in the bank, and you knew that from this certificate, which says you found the paper and the different items to agree with the book.

Mr. T. A. E. Weadock: I object to that as incompetent, for the reason he says he did not know whether he examined that paper or not; that they divided up the work of examination; someone would examine the cash and someone else the paper, and so on.

Overruled; exception.

(Question read.) A. Every single paper?

Q. Yes, every single paper. You could not make that examination without seeing every single paper, could you?

A. Let me read this (reading Exhibit 243). I would not say right now by reading this, that I knew I saw every single paper.

Q. Did you or didn't you?

A. I don't know.

Q. Read the paper.

A. I have read it.

Q. Now, you could not have examined the assets and liabilities of the bank and found them to agree with the statement without examining all the Maltby line?

A. I might not have examined all the Maltby line myself personally.

Q. Did you not yourself?

A. I wouldn't say I did.

Q. Is that statement true?

A. I think it is.

320 Redirect examination.

By Mr. T. A. E. Weadock:

Q. You were asked about Mr. Bump's producing papers from time to time, referring to the Maltby line of drafts and the bills of lading attached, and certificates attached, and invoices attached; and you referred also to the books from which the discounts were read. State, if you can, how often, or if at all, Mr. Bump ever produced before the board, while they were reading off the discounts, the actual papers themselves.

A. My impression is, sometimes the board called to see those papers.

Q. And when they called for them, did he produce them?

A. Yes, sir.

Q. Do you remember whether that happened often, or more than once?

A. I don't think it happened often.

Q. I show you Exhibit 244, taken from the red box, and ask you whether that is the general form that the papers were in that were produced by Mr. Bump before the directors, calling attention, in the first place, to the draft, to the bill of lading, the certificate of inspection and the invoice, and the assignment of them?

A. This is in the usual form.

Mr. T. A. E. Weadock: I offer Exhibit 244 in evidence: "Bay City, Michigan, November 26th, 1902. Three months after date pay to the order Old Second National Bank of Bay City, Michigan, \$263.30

value received, and charge the same to account of Maltby Lumber Company. To Chicago, Milwaukee & St. Paul Railroad Company, Chicago, Ill." Across the end: "The Maltby Lumber Co." Attached to that is a certificate of inspection, marked—"Original shipped to Chicago, Milwaukee & St. Paul Railroad Company, care of J. B. May, Purchasing Agent, on the 25th of November, 1902, from the Maltby Lumber Company at Temple, 561 No. 1 cedar ties. M. C. Guy, Inspector. Bill of Lading of Ann Arbor Railroad, Temple Station, 11/26, 1902. Received from Maltby Lumber Co., etc., ties Marked C. M. & St. Paul Railway Co., Milwaukee, Wisconsin, day book 1184. Signed M. Russell, Agent. Initial and number of car, W. & L. E. 12212. Invoice Maltby Lumber Company, November 26, 1902. Number 983. Sold to Chicago, Milwaukee & St. Paul Railroad Company, Chicago, Illinois, car W. & L. E. 12218. Quantity, 560 cedar ties. Price 47 cents, total, \$203.20." Endorsed by rubber stamp. "Pay this amount in regular course to Old Second National Bank, Bay City, Michigan." Signed in ink "Maltby Lumber Company."

321 By Mr. T. A. E. Weadock:

Q. Mr. Chesbrough, Mr. J. C. Weadock in cross examining you, used the word "anxious" as to whether you were anxious about the Maltby line. Please state fully what you understood him to mean?

A. I think he meant if I was afraid of it.

I don't think I was afraid of it; my idea at that time of the size of the line, I think I testified I thought it was large; when I used the words "reasonably good" in answer to one of the questions asked me as to whether this paper was reasonably good, I meant nearly all collectible; you can not say in advance that any paper is absolutely good; I don't remember when that inquiry as to my being anxious as to the papers, was directed.

Recross-examination.

By Mr. John Weadock:

Q. Referring to the papers taken out of the red box by your counsel, I call your attention to what he terms a bill of lading of the Ann Arbor Railroad, Consignee, as shown by this bill of lading was the C. M. & St. Paul Railway Company. Now that meant that the shipment was made to the Chicago, Milwaukee and St. Paul Railway Company, did it not?

A. Yes, sir.

Q. And you knew, when these wood products arrived at their destination they would be taken away by the C. M. & St. Paul Railway Co., did you not.

Mr. T. A. E. Weadock: That is objected to as incompetent. The paper speaks for itself. Mr. Chesbrough was not here at this time and there is no evidence he knew anything about this particular paper. It was introduced for the purpose of showing the condition in which that paper was.

The Court: The objection is overruled.

Exception.

A. Presumably, yes, sir.

Q. You knew that the Maltby Lumber Company's right to control those products covered by that shipment was absolutely gone?

Mr. T. A. E. Weadock: We object to that as incompetent and immaterial, and as matter of law.

Overruled; exception.

A. No——

Mr. T. A. E. Weadock: And it is also objected to for the reason that the assignment of the invoice carried with it the title to the account, and the acceptance by the company of the invoice as shown by the correspondence already in evidence.

The Court: The objection is overruled.
Exception.

A. No, I don't know that I know that.

Q. You knew that the goods were shipped to the Chicago, Milwaukee & St. Paul Railway Company, consigned to the Chicago, Milwaukee & St. Paul Railway Company, and would be taken by the Chicago, Milwaukee & St. Paul Railway Company when they arrived at their destination, without Maltby ever saying a word, did you not?

Mr. T. A. E. Weadock: I object to that as a mere matter of statement; and the fact also appears that the Chicago, Milwaukee & St. Paul Railway Company would either have to have this bill of lading in order to get the goods or the road shipping them would take the responsibility of shipping them without a bill of lading, as they probably would, as the Chicago, Milwaukee & St. Paul Railway Company was good for it.

Overruled; exception.

A. No, I don't know that I know that.

Q. You don't know that you didn't know it?

A. No.

Q. Do you say, as a banker, that that particular bill of lading which your counsel has picked out, has any value at all as security.

Objected to as a question of law.

Overruled; exception.

A. I think so.

It has the value of timber, of the ties, the ties shipped by Maltby Lumber Company to the railroad company; the ties had all been shipped to the railroad company; and that paper is an evidence of it.

By Mr. John Weadock:

Q. I have picked out of this box a draft which is dated December 23, 1902, payable three months after date to the order of the Old Second National Bank for \$4,106, drawn on the Grand Trunk Rail-

way Company, signed Maltby Lumber Company, per J. M., and attached to it I find a Maltby Lumber Company inspection certificate, dated Feb. 21st, 1902, and a bill of lading dated Feb. 21st, 1902, and an invoice dated March 15, 1902, the invoice being for the exact amount of the draft, namely, \$4,106, and ask you whether you regarded that invoice as security for that draft?

323 Mr. Humphrey: That is objected to as not proper cross examination.

The Court: It is proper in view of the direct examination relative to Exhibit 244.

Mr. Humphrey: Let me say this, if the court please. Now, that is probably one of two papers that are attached. Your Honor will remember the testimony of Judge Collins that he prepared a system for them to do their business by, and had got up this system for the purpose of their getting the security. Now, whether some of these papers, since this box has been knocked around here in these files, have got lost, so that they are not all attached to the drafts, we do not know. We have never seen them. We were simply attempting to identify the system that was prepared by Judge Collins. We haven't any doubt just as your Honor has seen with reference to a great many of these papers, that some of the papers have become detached. They were simply pinned together and they have got unpinned and we found letters here the other day where some of the things that had been pinned through them were gone, and it is the same with these drafts. The thing we wanted on the record, and the only thing this was introduced for, was not for the purpose of proving anything with regard to that shipment, but it was to get before the jury that form through which it was claimed that security was got on these drafts, and we submit that the examination upon some other paper than the one we introduced for that purpose, is not competent and not proper cross examination.

Mr. John Weadock: I apprehend there is no necessity for reply to that argument, but I submit it is not proper for counsel to make that argument here. It is unintentional, no doubt, but it is a suggestion and explanation to the witness on the stand. I want to call your Honor's attention to the fact that this witness has testified with reference to the particular paper which your Honor has in your hands, that it is substantially like all the other papers.

The Court: The objection is overruled and the document is admitted as Exhibit 245.

(Question read.)

324 Mr. T. A. E. Weadock: I make the further objection, there is no evidence before the court, that this bill of lading and certificate of inspection are in the same condition now that they were in 1902, or whatever time they were taken. This is ten years afterwards, and an accountant has been handling them over for three months, and there has been one trial of the case, and there is no evidence here to identify the paper and show whether or not it is in the same condition now as it was then.

Objection overruled; exception.
(Question read.)

A. I don't know whether it is or not. Here are three or four papers. I don't know whether one has any relation to the other or not.

Papers marked Exhibit- 245a, 245b and 245c.

Mr. Humphrey: We want a general objection, and the benefit of an exception, to cross examination matters that have not been suggested or brought to the attention of the court on direct examination, so that we may have the exception to all those things.

The Court: You may have the exception. The court holds this is germane to the cross examination in view of the direct examination relative to Exhibit 244.

Mr. T. A. E. Weadock: In connection with the paper just offered, the draft and bill of lading, I offer in evidence. I offer in evidence Exhibits 43 and 49. They are now offered in connection with the bill of lading previously offered.

The Court: They are received for the second time.

Mr. T. A. E. Weadock: I want to call your Honor's attention to the fact, as matter of law, that the directors are not required to sign the copy for the printer; they are only required to sign the report that goes to the comptroller. Now, I want to ask Mr. Woodworth one or two questions that I omitted inadvertently on cross examination.

FRANK T. WOODWORTH (recalled) on behalf of the defendant.

By Mr. T. A. E. Weadock:

I think I did know at the time I bought my stock that Mr. Maltby was doing business with the Second National Bank; I knew he kept an account there.

Q. You knew that Mr. Maltby had been doing business with the Second National Bank for about twenty years?

A. I know he was doing business there at the time I was interested under the name of A. Maltby. In 1902, I knew that Mr. Maltby had been doing business at the Second National Bank for about 20 years, and that his office was in the same building the bank was in.

Mr. Clark: Did you know anything about the amount of the Maltby paper that the bank had?

A. None at all. Nothing whatever. I did not know what the condition of the Maltby business was. I knew he failed, and went in bankruptcy in 1895. I didn't know he was doing much of any business. He had no resources to do any business with.

Mr. T. A. E. Weadock: Did you ask Mr. Andrews at the time you went with him with reference to the statement as to whether or not there was any paper of Mr. Maltby in the bank?

A. No, sir.

Q. You sold three of your shares, did you not, to Mr. Andrews?

A. I just as soon answer what it was for, if I am allowed to. I did not sell three shares; I sold two and a half.

Deposition of Alvin Maltby, Taken Pursuant to Notice, at Jackson, Miss., on Nov. 11th, 1912, Before E. L. Trenholm, Notary Public.

ALVIN MALTBY, called as a witness in behalf of defendants, having been first duly sworn, was

Examined in chief.

By Mr. T. A. E. Weadock, and testified as follows:

I have lived in Jackson, Miss., about six years; prior to that time I resided at Bay City, Mich.; I lived at Bay City, Michigan, about thirty years; the first business I was in at Bay City, Michigan, was the produce business; I was then associated with Mr. Carter under the name of Carter and Maltby; my business connection with Mr. Carter continued about three years; we were located on Water street, just across from the Fraizer house, in the Payne block; I am not sure, but I think Bay City had a population of about fifteen thousand at that time. Mr. Brotherton and Mr. Henry Gifford bought out Mr. Carter, and the business continued under the name of Maltby, Brotherton & Company, under which name we continued in business about three or four years; then Mr. Waterman bought out Mr. Gifford, and the firm was Maltby, Brotherton and Waterman; while Mr. Gifford was connected with the firm we had put in some groceries, and we put in more after Mr. Waterman came in; that firm continued about two or three years when Mr. Paige came into the firm and we
326 did business under the name of Maltby, Paige & Company, which firm continued in business for about two years, then Watrous brothers bought out Mr. Paige; the Watrous brothers were Henry M. and Orville A.; the business continued under the name of Watrous Brothers & Co. for about six or eight years, I think, before I went out of it; the grocery business was continued after I left,—the wholesale grocery business; I think about four or five years after we started in the first place, the concern moved down to the vicinity of Third and Water Street; each of those business connections were successful while I was connected with them. I went into the lumber business after I sold out, which business I followed for about twenty years; I was associated in the lumber business with Mosier & Son, Smalley & Woodworth; the last half of the year, I was associated with Black & Fox; I was associated with Mr. Columbus C. Baker for a year; my first lumber association was with Waterman & Davidson; my business connection with Mr. Barker was, Mr. Barker bought three or four thousand acres of land, put up the money for it and we lumbered it,—sold the logs; that was in the vicinity of Boyne Falls, Michigan; I have known Frank T. Woodworth for about twenty or twenty-five years, I think;

I got acquainted with him first when he was a messenger for the Second National Bank; he used to come to my office with business drafts; that continued for possibly three or four years, I don't remember how long. I knew him continuously from that time to this: The firm of Smalley & Woodworth consisted of D. C. Smalley and Will Smalley, and Mr. Woodworth; D. C. Smalley was one of the directors of the Second National Bank, and remained such director during his life; I think Mr. William T. Smalley is the son of James S. Smalley.

My business connection with Smalley & Woodworth was, we bought timber together, handled the logs and the lumber and divided the profits; I transacted this business almost entirely with Mr. Woodworth; he knew where I did my banking business. I first started to do my banking business with the State Bank, then that bank was merged into the Second National Bank. Orrin E. Bump was the cashier of the State Bank; Bump came from Flint, Michigan, to Bay City; I did not know him at Flint; during the time I was at Bay City my banking business was done with Mr. Bump; I think it was about a year or two after I went to Bay City that the State Bank merged with the Second National Bank; when I first knew of the Second National Bank it was down at the foot of Water Street, I don't remember the name of the building now,—not the foot of Water street, foot

of Center street,—yes on Water street; it moved up into the
 327 Westover Opera Building before that building was burned, and after the Westover Opera Building was burned, it was called the Phoenix; and from the time the Westover Opera building was burnt the Second National Bank operated in that place. My office was in the Phoenix; I was in business in that building, I think six or eight years. Mr. Woodworth done his banking business at the old Second National Bank; the Old Second National Bank was another name for the Second National Bank after its reorganization; I think it was in about 1888 or '9, I won't be positive, that I formed by business arrangement with Mosher & Son; Mosher & Son consisted of the elder Mosher of West Troy, New York, and Fred Mosher, his son; Fred Mosher lived in Bay City; that association continued two or three years; I cannot say as to the exact year when Mosher & Son failed; I was very heavily involved in that failure; I had had no business difficulty at all up to the time of the Mosher failure; after the Mosher failure, I went through bankruptcy; I think I got my discharge in bankruptcy in about '93 or '94, I won't be positive, I don't remember the exact date.

After I went out of the wholesale grocery business, I conducted my lumber business under the name of A. Maltby for a number of years, afterwards, under the name of the Maltby Lumber Company. The Maltby Lumber Company at first consisted of my wife, Alzina Maltby and Mr. Charles Fox,—for a year—, and Mrs. Maltby bought them out and we continued under the name of Mrs. Alzina Maltby; up to that time, the lumber business of A. Maltby & Company had been successful; at first that company operated in lumber and logs, and the last five years in cedar poles and ties almost entirely; at

that time, the lumber business, as to ties and telegraph poles and shingles was a good business; I believe the firm of Mosher & Company owed a large amount to the Second National Bank; I made a settlement with the Second National Bank,—per agreement with Mr. Bump and the directors,—before I went through bankruptcy; that liability was not a direct liability of myself, but a liability connected with the firm of Mosher & Maltby; I became liable by endorsing for their account; I presume I knew Mr. Woodworth when he was bookkeeper in the bank after he ceased to be messenger, and yet I don't remember him in that position; I took up especially the business of dealing in cedar poles and material of that sort about a year or two before I received my discharge in bankruptcy; I did business with the Western Union, The American Tel. & Tel. Co., Chicago, Northwestern Railroad Company, G. R. C. Railroad, Grand Trunk Railroad, Michigan Central Railroad, New York Central Railroad, Pennsylvania Railroad, Grand Rapids & Indiana Railroad, and with nearly all of the Interurban lines,—with

328 the Detroit United Railway and the Cleveland Northwestern Railway; this was a very profitable business; I did business both by lumbering my own timber and buying timber ready prepared along the lines of the road, mostly timber that others prepared; the Mosier failure was a very large failure, the largest, I think, that was ever known in Bay City; it was discussed generally and at length in the papers, and caused much litigation; it had great publicity and affected a great many firms and people; I understood that it caused the Second National Bank to reduce its capital from four hundred thousand dollars to about two; in the beginning my cedar business was conducted under the name of the Maltby Lumber Company; that company consisted of Mrs. A. Maltby; I do not think that company had a commercial rating at that time; I never gave any statements to the commercial reports and I don't think they ever had any, that is, no capital rating; the effect of having no capital rating was, we had to pay cash for all our products, or did pay cash, but we had no local trouble because of having no credit; the business was carried on by the sale of the product to these different companies and drafts on the companies; these drafts were made for the shipments,—products some of the material received by our customers was paid for to the bank and some of them paid directly to the Maltby Lumber company, by drafts being made on the companies; these railroad, telegraph and telephone companies did not accept drafts; the drafts were held in the bank until the payments came in and then were taken up; there was printed on the back of the drafts, "Pay to the Old Second National Bank in the ordinary course of business"; "the ordinary course of business" meant, as soon as it was checked up by the treasurer that they would remit for it, either to ourselves or to the bank, that is, the treasurer of all the concerns,—railroad companies, telegraph companies,—to whom the material had been sent; during all the time that I was in business in Bay City from first to last, after the consolidation of the State Bank with the Second National Bank, I did my banking business with the Second National Bank and with the Old Second National Bank; most of this business was done with Mr. Orrin

Bump; as to the drafts that were held by the bank in the fall of 1902 and 1903, I did not transact all that business with Mr. Orrin Bump; sometimes Mr. Bump would be away and then I would generally transact the business with Mr. Andrews; Mr. Orrin Bump was nearly as familiar with all my business career and business history in every way as I was myself; I do not remember the sum that I had agreed upon with Mr. Bump as a settlement for my Mosier & Maltby liability prior to the bankruptcy; I cannot remember exactly,

by years, how much we made net out of the lumber business
 329 during 1900, 1901 and 1902, but I do not think there was any year we made less than ten thousand dollars and up to as high as thirty-five thousand dollars; in 1902, I think we had an office at Boyne Falls, and a yard at River Rouge, I think we had a yard at Alpena, possibly not until '93; yes, in 1903 and at Pinconning and Bay City; all of the time, our headquarters was at Bay City in the Phoenix building; in 1902, when we lumbered from our own lands, we had between twenty-five and thirty thousand acres; this land was situated north of Pinconning, principally in Ogemaw county; we kept a land book, showing what lands we had, descriptions and so on; some of this land was held merely on a tax title, but only a small portion of it was held on a tax title, there were unpaid taxes against quite a good deal of the lands; a man having a tax title to lands in Michigan has the right to cut the timber on the lands; but a man having land against which taxes have been assessed and are unpaid cannot cut the timber from the land; as I understood it, the timber was liable to seizure; we had some logs seized for taxes, but only a small amount, we settled it up by paying the taxes and got the logs; I don't remember what year that was in; the business had still gone on in the name of the Maltby Lumber Company, I do not remember that we had any financial difficulty with anybody in the year 1902; there were no judgments against the company at any time.

Q. I show you Exhibit "V" on the former trial,—and if the Commissioner will just identify it on the trial—(marked Exhibit "V," E. L. Trenholm, Commissioner)—I will ask you what book that is?

Witness: That is our land book, supposed to contain the records of the lands we owned during the time of the Maltby Lumber Company; that book is supposed to contain all of the lands that we owned in 1902,—in October, 1902; any sales that were made of lands or timber or anything is supposed to be recorded in this book; in 1902 the Maltby Lumber company owned between twenty-five and thirty thousand acres of land; a good deal of this land was good for farming land, most of it; a good deal of it was timber; I don't remember just now the value of the timber on those lands in 1902; I think we put a value on them in our inventory; during the last year or so that book was kept by a young lady by the name of Miss Hessey, and previous to that time it was kept by Mr. Slocum; I think Mr. Slocum is now in the Upper Peninsula somewhere, I don't know just where; I do not know where Miss Hessey is now; in speaking of the inventory I refer to the inventory taken in October, 1902;

330

EXHIBIT 247.

Maltby Co. Inventory of October 31st, 1902.

Inventory of Real Estate.

Roscommon County.

Town 23 N. of Range 4 W.

Sec. 2.	N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$)		
	S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)	Land and all....	\$200.00
3.	N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	" " "	200.00
4.	S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$	" " "	400.00
	N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$	Timber only....	300.00
5.	N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)		
	E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$)	" " "	300.00
	S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)		
6.	N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)		
	N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$)	Land and all....	150.00
5.	N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$)	" " "	50.00
6.	S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)		
	S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$)	Timber only....	2,000.00
	N. $\frac{1}{2}$ of S. $\frac{1}{2}$)		
	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)		
7.	N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$)		
	N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$)	Land and all....	300.00
12.	S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)	Land only.....	20.00
	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	" " "	50.00
13.	Lot 4 and S. E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	Land only..... {	10.00
	Lot 3)		75.00
331			
	S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)		
	E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)	Timber only....	250.00
23.	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)		
24.	Entire, except lake)		

Town 23 N. of Range 3 W.

1.	Lots 2 and 3	Land and all....	150.00
6.	N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	" " "	5.00
10.	Lot 3)		
11.	" 4 and 6)	" " "	25.00
15.	Lots 1, 2, 3, 4, 7 and 8	Timber only....	700.00
16.	N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	Land and all....	250.00
	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	" " "	150.00
17.	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	Timber only....	100.00
20.	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	" " "	75.00
26.	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	Land and all....	50.00

\$5,810.00

332				
Sec. 34.	N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$	)	Brought Forward.	\$5,810.00
	N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	)	Land only.....	150.00

Town 24 North of Range 3 West.

25.	S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$)		
26.	S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)		
	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		
	S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	)	Land and all....	600.00
27.	E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$)		
36.	N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$)		
	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)		

Town 22 North of Range 2 West.

5.	W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$	)	Land and all)	
	N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	)	Timber only (...	50.00
8.	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	)	Tax Deed.....	50.00
15.	W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$)		
	N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	)	" " .....	500.00
16.	N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$	)	Land and all....	250.00
	N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)	Tax Deed.....	75.00

Town 22 North of Range 1 West.

6.	N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$)	Land and all....	100.00
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Town 22 North of Range 3 West.

35.	Entire S. W. $\frac{1}{4}$		Land and all....	250.00
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Town 22 North of Range 4 West.

17.	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$		Equity	100.00
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Town 23 North of Range 2 West.

11-12)				
13-14)	Johnson Timber.....			1,500.00

Town 21 North of Range 4. West.

1.	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)		
	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)		
2.	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)		
	Ent. N. W. $\frac{1}{4}$)		
	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		
3.	E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)		
	Ent. N. W. $\frac{1}{4}$)		
	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		
	N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$)		
	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	)	(See page 3.)	
4.	S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)		
11.	N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	)		\$9,435.00

			Brought Forward.	\$9,435.00
Sec. 12.	E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)		
15.	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		
16.	S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	)	Land and all....	3,000.00
26.	N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)		
8.	N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)		
9.	N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$	)	Land and all....	400.00

Town 24—North of Range 4 West.

19.	N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	.....	50.00
334			
	S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	.....	50.00
30.	N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	.....	100.00
	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	.....	250.00
33.	W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	.....	200.00
34.	S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	.....	50.00

Town 24—North of Range 2 West.

26.	W. $\frac{1}{2}$ Ex't N. W. $\frac{1}{4}$		
	of N. W. $\frac{1}{4}$	Land and all)	
	S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	Timber only)	
	N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	" ")	
	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	" ")	
27.	S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	Land and all)	
	S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	")	
33.	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	")	
34.	N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	")	
35.	N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	Timber only)	12,000.00
	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	Land and all)	
	E. $\frac{1}{2}$ of E. $\frac{1}{2}$)	
36.	N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	Land and all)	
	Bal. W. $\frac{1}{2}$ of Sec.	Timber only)	

Town 23—North of Range 2 West.

2.	N. W. $\frac{1}{4}$	Land and all)	
	E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	")	
	W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	")	
	E. $\frac{1}{2}$ of E. $\frac{1}{2}$	Timber only)	
335			
	S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	")	

Town 21—North of Range 1 West.

Woods timber.....	50.00
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Missaukee County.

Town 24—North of Range 5 West.

13.	N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$) Ent. S. $\frac{1}{2}$ except) above and S. E. $\frac{1}{4}$) of S. E. $\frac{1}{4}$)	Land and all . . .	500.00
24.	Ent., ex't N. W. $\frac{1}{4}$ of) S. W. $\frac{1}{4}$)	Land and all . . .	4,000.00
23.	W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$) S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)		
25.	Ent. Exc't N. $\frac{1}{2}$ of) N. W. $\frac{1}{4}$ and W. $\frac{1}{2}$) of S. E. $\frac{1}{4}$)	Land and all . . .	
			\$30,085.00
		Brought Forward.	\$30,085.00

Town 21—North of Range 7 West.

Missaukee.

Sec. 7.	S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)	Land and all . . .	300.00
31.	E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$)		
32.	S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$) N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$) and	Timber only . . .	300.00
	Robbins lands in 21 and 22, 7 West		300.00

Town 22—North of Range 8 West.

36.	N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	Land and all . . .	125.00
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Town 23—North of Range 5 West.

336	2.	S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	Timber only . . .	150.00
	7.	Ent. N. E. $\frac{1}{4}$) E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$) N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$) Ent. S. E. $\frac{1}{4}$)	Timber only . . .	1,000.00
	8.	W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$) S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$) S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		

Arenac.

Town 19—North of Range 6 East.

	4.	N. E. $\frac{1}{4}$) E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$) N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$) E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$)	(In pencil:) 13 40 —	
	9.	E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)	520 Acres . . .	600.00
	10.	N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$)		

Town 20—North of Range 5 East.

1.	E. $\frac{1}{2}$ of W. $\frac{1}{2}$	Timber only.....	50.00
22.	S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$)	"	
27.	N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$)	"	
	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)	"	200.00
34.	N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$)	"	
25.	S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$)	"	

Town 20—North of Range 7 East.

7.	N. $\frac{1}{2}$ of N. $\frac{1}{2}$	Timber	55.00
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337

Otsego.

Town 32—North of Range 2 West.

4.	N. W. $\frac{1}{4}$	600.00
35.	S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	750.00
36.	W. $\frac{1}{2}$ and S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	1,400.00
	E. $\frac{1}{2}$ and S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	400.00

Town 32—North of Range 1 West.

32.	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)		
33.	S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ {		200.00

 \$36,515.00

Brought Forward. \$36,515.00

Otsego.

Town 31—North of Range 2 West.

Sec. 1.	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	150.00
	S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	75.00
	E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	650.00
	S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$)	
	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ {	500.00
12.	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	500.00
	S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	750.00
	N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	150.00
	W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$) Cedar	100.00
	S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ {	

338

Town 31—North of Range 1 West.

5.	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	100.00
	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	375.00
	S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	125.00
	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	275.00
	N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	300.00

6.	S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	50.00
	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	150.00
	E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	700.00
	N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	625.00
7.	N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$	875.00
	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ }	400.00
	N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ }	

Town 32—North of Range 3 West.

1.	W. $\frac{1}{2}$ except S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	1,400.00
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Cheboygan.

Town 33—North of Range 2 West.

33.	W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$)	Land only.....	600.00
	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ }		

Town 33—North of Range 3 West.

35.	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	200.00
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Wexford.

Town 21—North of Range 10 West.

6.	W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	Land and all....	225.00
8.	S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	Timber only....	10.00

339 Town 22—North of Range 10 West.

27.	S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)	Land and all....	1,200.00
	S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$)		
	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		
	S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$)		
26.	W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$)	Timber only....	500.00
	S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		
33.	N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$)		
	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		
	N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$)		
34.	Ent. except,		
	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)		
35.	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$)		
	S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$)		

Crawford.

Town 25—North of Range 3 West.

 \$47,400.00

22.	E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	Timber only. (See next page.)	
		Br't f'rd.....	\$47,400.00

Crawford.

Town 25—North of Range 3 West.

Sections.

27.	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	Timber only....	50.00
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Oscoda.

340

Town 28—North of Range 1 East.

32 and 33—	McCallum Lands.....	100.00
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Town 25—North of Range 1 East.

4.	S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	Land and all....	50.00
9.	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	" " "	50.00
	N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$)		
	S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)	Timber only....	50.00
10.	S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$)		
	N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$)		

Town 25—North of Range 3 East.

31, 32, 33, 34 and 35.	Timber only....	500.00
25, 26, 33, 34, 35 and 36.	Land and all....	1,600.00

Town 25—North of Range 4 East.

10.	S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ }	Timber only....	50.00
11.	S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ }		
17, 20, 21, 28, 31, 32 and 33	and 29.	Land and all....	1,800.00

Alcona.

Town 25—North of Range 9 East.

18.	N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ }	Land and all....	250.00
	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ }		
16.	S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ }	Land and all....	150.00
	S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ }		

Ogemaw.

Town 23—North — Range 2 East.

341

15.	Ent. S. W. $\frac{1}{4}$	Timber only....	250.00
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\$52,300.00

Br't Frd \$52,300.00

Ogemaw.

Town 24—North of Range 4 East.

Sections.

6.	E. $\frac{1}{2}$	3,000.00
	6520 acres @ \$3.00.....	19,660.00

Town 24—North of Range 3 East.

3.	S. W. $\frac{1}{4}$ }	5,000.00
4.	S. E. $\frac{1}{4}$ }	
	3560 acres @ \$2.00.....	7,120.00

Iosco.

Town 24—North of Range 5 East.

1720 acres @ \$3.00.....	5,160.00
2400 " " 2.50.....	6,000.00

Town 21—North of Range 6 East.

7.	Ent. S. E. $\frac{1}{4}$)	
8.	" S. W. $\frac{1}{4}$)	
18.	Entire)	
17.	" W. $\frac{1}{2}$	)	Land and all....
	" S. E. $\frac{1}{4}$	)	Taxes unpaid.
20.	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$)	
30.	W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$)	

342

Wisconsin.

Town 36—North of Range 13 East.

12.	S. $\frac{1}{2}$ of S. $\frac{1}{2}$	Land and all....	700.00
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Town 37—North of Range 13 East.

22.	E. $\frac{1}{2}$	} Timber only....	1,200.00
	E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$		
	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$		
	Pineconning Yard.....		500.00
	Boyne Falls Yard.....		400.00
	Pembine Yard.....		125.00

 \$104,165.00

Br't F'rd..... \$104,165.00

Charlevoix County.

Town 32 North of Range 5 West.

Sec. 2.	S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$	}	Land only.....	480.00
3.	N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$			
3.	W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$	}	Land and all less hemlock and hardwood	480.00
4.	E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$			
9.	N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	}	Land and all; no timber of value	840.00
9.	S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$			
10.	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$			

343

24.	N. $\frac{1}{2}$ of N. $\frac{1}{2}$	}	Land only.....	400.00
27.	W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$			
28.	S. E. $\frac{1}{4}$ and S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$	}	Land and all....	2,000.00
	E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$			
	S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$			
29.	N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$	}	Land and all, less cedar timber sold	960.00
30.	S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$			
30.	Ent. S. E. $\frac{1}{4}$			
31.	N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$			
34.	N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$			400.00

Town 32 North of Range 6 West.

24.	E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$	}	Land and all....	800.00
25.	N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$			

Town 33 North of Range 5 West.

10.	Entire N. E. $\frac{1}{4}$			800.00
11.	N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$			200.00
15.	S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$			400.00
22.	N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	}	.....	800.00
	S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$			
	N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$			

344

28.	Ent. N. W. $\frac{1}{4}$	}	Land only.....	600.00
	N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$			
33.	Ent. S. E. $\frac{1}{4}$	}	Land and cedar..	1,120.00
	S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$			
34.	S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$			

Emmett County.

Town 38 North of Range 4 West.

20.	N. $\frac{1}{2}$ Ent.	}	All timber.....	300.00
21.	S. $\frac{1}{2}$ of N. $\frac{1}{2}$			
21.	Ent. S. W. $\frac{1}{4}$	}	Land and all....	1,000.00
	S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$			

Town 35 North of Range 5 West.

23.	N. $\frac{1}{2}$ of N. $\frac{1}{2}$	All timber.....	1,000.00
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\$116,745.00

Br't Frwd..... \$116,745.00

Wexford County.

Town 21 North of Range 9 West.

Sec. 19.	N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	Timber only....	\$250.00
	Equity in Littlefield		
	timber, Cheboygan.....	300.00	550.00

345

\$117,295.00

Deductions from real estate:

N. C. Hartingh A/C for taxes.....	\$369.00	
E. J. Wright " " "		
lands, etc.....	2,050.38	
A. H. Phinney A/C for taxes.....	242.00	2,661.38

\$114,633.62

Washington Ave. Residence.....	\$4,500.00	
Encumbrance.....	1,800.00	2,700.00
Farm at Flint.....	\$2,500.00	
Encumbrance.....	1,000.00	1,500.00

\$118,833.62

346

Poles Inventory.

Alpena Yard

20 ft	5s—	56	@	55c	.....	30.80
25 "	4s—	40		62c	.....	24.80
25 "	5s—	154		75c	.....	115.50
25 "	6s—	169		1.20	.....	202.80
30 "	6s—	75		1.65	.....	123.75
30 "	7s—	37		3.15	.....	116.55
35 "	7s—	33		4.40	.....	145.20
40 "	6s—	13		4.50	.....	58.50
40 "	7s—	22		5.50	.....	121.00
45 "	6s—	17		5.70	.....	96.90
50 "	7s—	2		12.00	.....	24.00
55 "	7s—	1		14.85	.....	14.85

619

\$1074.65

Rose City

65 poles	20 ft	4s	@	50c	.....	\$32.50
41 "	20 "	5s		55c	.....	22.55
20 "	25 "	4s		62c	.....	12.40
44 "	25 "	5s		75c	.....	33.00
20 "	25 "	6s		1.20	.....	24.00
8 "	30 "	6s		1.65	.....	13.20
1 "	35 "	6s		3.50	.....	3.50

199

141.15

Lupton

55 Poles	20 ft	4s	@	50c	.....	\$27.50
25 "	20 "	5s		55c	.....	13.75
90 "	25 "	4s		62c	.....	55.80
98 "	25 "	5s		75c	.....	73.50
51 "	25 "	6s		1.20	.....	61.20
43 "	30 "	6s		1.65	.....	70.95
2 "	30 "	7s		3.15	.....	6.30
25 "	35 "	6s		3.50	.....	87.50
4 "	35 "	7s		4.40	.....	17.60
12 "	40 "	7s		5.50	.....	66.00
4 "	45 "	7s		7.25	.....	29.00
1 "	50 "	7s		12.00	.....	12.00

410

521.10

\$1,736.90

347

Poles Inventory.

					Brt. Frwd.	\$1,736.90
South Branch						
31	Poles	20	3s @	30c	.....	\$9.30
277	"	"	4s	50c	.....	138.50
55	"	"	5s	55c	.....	30.25
67	"	25	4s	62c	.....	41.54
39	"	"	4s	75c	.....	29.25
5	"	"	6s	1.20	.....	6.00
2	"	30	6s	1.65	.....	3.30
<hr/>						
476						258.14

West Bay City

12	Poles	25 ft	6s @	\$14.40		
10	"	30 "	6s	16.50		
4	"	35 "	7s	17.60		
4	"	40 "	7s	22.00		
<hr/>						
30						70.50

Twining

23 poles, aver.	50c	11.50
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Pierce District.

401 poles, aver.	\$1.50	601.50
<hr/>			\$2,678.54

Brt. Frwd. 2,678.54

River Rouge Yard

4284	20 ft	4s	62c	.....	\$2656.08
2262	20 "	5s	70c	.....	1583.40
999	20 "	6s	93c	.....	929.07
2971	25 "	4s	78c	.....	2317.38
10016	25 "	5s	95c	.....	9515.20
5432		5 1/2	1.15	.....	6246.80
9772		6s	1.45	.....	14169.40
1356		7s	1.85	.....	2508.60
389		8s	2.00	.....	778.00
778	30 "	5s	1.58	.....	1229.24
4566		6s	2.00	.....	9132.00
3105		6 1/2 s	2.65	.....	8228.25
1219		7s	3.65	.....	4449.35
417		8s	4.25	.....	1772.25
90	35 "	5s	2.40	.....	216.00
1956		6s	4.00	.....	7824.00
1765		7s	5.05	.....	8913.25

20—536

348

447		8s	6.25	.....	2793.75
551	40	" 6s	5.20	.....	2865.20
828		7s	6.25	.....	5175.00
185		8s	8.10	.....	1498.50
68	45	" 6s	6.60	.....	448.80
81		7s	8.10	.....	656.10
5		8s	13.25	.....	66.25
57	50	" 6s	9.80	.....	558.60
100		7s	13.25	.....	132.50
89	55	" 7s	16.20	.....	1441.80
4	60	" 7s	21.25	.....	85.00
6	65	" 7s	28.00	.....	168.00
6	70	" 7s	30.00	.....	180.00
3	75	" 7s	35.00	.....	105.00
<hr/>					
53790					98,642.77

(In pencil)

140

149

107

53

1975 second grade poles, aver. \$1.75..... 3,456.25

\$104,777.56

Brt. Frwd. \$104,777.56

Pinconning Yard

3350	poles	20 ft	4s	@	50c	.....	1675.00
3025	"		5s		55c	.....	1663.75
80	"		6s		75c	.....	60.00
2259	"	25 ft	4s		62c	.....	1400.58
3950	"		5s		75c	.....	2962.50
4546	"		5½s		95c	.....	4318.17
1652	"		6s		1.20	.....	1982.40
397	"		7s		1.50	.....	595.50
70	"		8s		2.20	.....	154.00
166	"	30 ft	5s		1.30	.....	215.80
338	"		5½s		1.50	.....	507.00
406	"		6s		1.65	.....	669.90
291	"		6½s		2.20	.....	640.20
1122	"		7s		3.15	.....	3534.30
5	"		8s		3.50	.....	17.50
312	"	35 ft	6s		3.50	.....	1092.00
219	"		7s		4.40	.....	963.60
198	"		8s		5.50	.....	1089.00

349

109	"	40 ft 6s	4.50	.....	490.50
180	"	7s	5.50	.....	990.00
31	"	8s	7.50	.....	232.50
59	"	45 ft 6s	5.70	.....	336.30
42	"	7s	7.25	.....	304.50
11	"	8s	8.60	.....	94.60
13	"	50 ft 6s	8.60	.....	111.80
7	"	7s	12.00	.....	84.00
17	"	55 ft 7s	14.85	.....	252.45
1	"	8s	19.00	.....	19.00
1	"	60 ft 6s	18.00	.....	18.00
4	"	7s	19.00	.....	76.00
3	"	8s	22.00	.....	66.00
1	"	65 ft 8s	25.00	.....	25.00

22865

26,642.28

\$131,419.84

Poles Inventory.

Boyne Falls Yard

Brt.Frwd. \$131,419.94

773	poles	20 ft 4s and 5s @	50c	....	386.50
911	"	25 ft 4s	62c	....	564.82
1944		5s	75c	....	1458.00
1333		5 1/2s	95c	....	1266.35
613		6s	1.20	....	735.60
139		7s	1.50	....	208.50
41	30 ft	5s	1.30	....	53.30
275		6s	1.65	....	453.75
71		7s	3.15	....	223.65
148	35 ft	6s	3.50	....	518.00
292		7s	4.40	....	1284.80
132		8s	5.50	....	726.00
128	40 ft	6s	4.50	....	576.00
248		7s	5.50	....	1364.00
5		8s	7.25	....	36.25
27	45 ft	6s	5.74	....	154.98
118		7s	7.25	....	855.50
5		8s	12.00	....	60.00
58	50 ft	7s	12.00	....	696.00
10	55 ft	7s	14.85	....	148.50
3	60 ft	7s	19.00	....	57.00
3	65 ft	7s	25.00	....	75.00
2	65 ft	8s	30.00	....	60.00
222	cull poles		.50	....	111.00

7689

12,073.50

350 Temple

961	poles	20	ft	4s	50c	....	480.50
849				5s	55c	....	466.95
169				6s	75c	....	126.75
416		25	ft	4s	62c	....	257.92
3171				5½s	95c	....	3012.45
231				6s	1.20	....	277.20
604		30	ft	6s	1.65	....	996.60
200		35	ft	6s	3.50	....	700.00
103				7s	4.40	....	453.20
31		40	ft	6s	4.50	....	139.50
13		45	ft	6s	5.74	....	74.62
1		50	ft	7s	12.00	....	12.00
600	unsorted				1.50	....	900.00

7349

7,897.69

\$151,391.03

Brt. Frwd. \$151,391.03

North Grandon

366	poles	20	ft	4s @	50c	.....	\$183.00
260				5s	55c	.....	143.00
104		25	ft	5s	75c	.....	78.00
215				6s	1.20	.....	258.00
39		30	ft	6s	1.65	.....	64.35
119				7s	3.15	.....	374.85
67		35		6s	3.50	.....	234.50
21				7s	4.40	.....	92.40
12		40		6s	4.50	.....	54.00
10				7s	5.50	.....	55.00

1213

1,537.10

Pinconning

145	cords	18"	shingle bolts @	1.00—	\$145.00	
311	5'	house blocks		.14	43.54	
953	6'	house blocks		.16	152.48	
220	car stakes			.05	11.00	

352.02

Cheboygan

50 poles,—aver. \$1.00

50.00

Western Union poles not invoiced
but inspected from yard

2 25 ft 9s \$4.75 \$9.50

351

53	30	ft	8s	4.75	251.75
278			8s	6.00	1668.00

1,929.25

Soo

138 poles 250.00

West Unity, Ohio

3 40 ft 6s \$5.35 \$16.05

3 7s 6.40 19.20

35.25

Reading, Ohio.

82 35 ft 5s \$1.50

123.00

John Kennedy poles on skids—T. 31-N-2-W

3431 poles aver. value on skids \$1.00 \$3431.00

Our share in profits 550.54

3,981.54

Griswold Dock, Bay City

15 poles 25 5 .83 12.45

48 6 1.30 62.40

9 7 1.88 16.92

62 30 6½ 2.54 157.48

23 35 6½ 4.40 101.20

12 40 7 6.18 74.16

169 424.61

\$160,073.80

Brt. Frd. \$160,073.80

L. D. Poles in Stock.

Boyne Falls and River Rouge.

5784 poles 25' 6½ @ 2.00 \$11,569.00

921 30 7 3.65 3,361.65

1588 35 7 5.15 8,178.20

1176 40 7 6.50 7,644.00

507 45 7 9.00 4,563.00

184 50 7 12.50 2,300.00

46 55 7 16.50 759.00

10 60 7 22.00 220.00

10216 38,593.85

352 Pinconning Yard

3342	poles	25'	6½	@	\$ 1.65	.....	5,514.30
6		30	7		3.15	.....	18.90
98		35	7		4.35	.....	426.30
40		40	7		5.50	.....	220.00
65		45	7		8.00	.....	520.00
56		50	7		11.00	.....	616.00

3607

1000 poles Gehl siding aver. 30c

7,315.50

300.00

206,283.15

Deduction on Poles.

Estimated Wagner commission.....	\$ 300.00
Cost of Kennedy poles on skids.....	2,230.15
Kennedy open account now includ. on acct. of unsettled resources	1,179.37
Est. frt. unpd. by us on 48 cars to W. U. . .	1,891.12
On other shpts., 15 cars	546.00

6,146.64

Cost of No. Grandon poles.....

1,000.00

199,136.51

Estimated claim for rebate against M. C.

Ry. Co. \$ 101.25

Against D. & M. R. R. Co., from Pincon-
ning yard

283.75

385.00

199,521.51

Poles Inventory\$199,521.51

Tie Inventory.

Alpena & Northern

5907	#1	cedar	ties	@	33c	.....	\$1,949.31
2780	#2	cedar	ties	"	18c	.....	444.80
356	#1	hem.	ties	"	20c	.....	71.20

\$2,465.31

Alpena Yard

5042	#1	cedar	ties	@	34c	.....	\$1,714.28
10602	#2	"	"	"	18c	.....	1,908.36
78	#1	hem.	"	"	24c	.....	18.72
10	#2	"	"	"	12c	.....	1.20

3,642.56

353 Black River

1155	#1	cedar	ties	@	33c	.....	\$ 381.15
449	#2	"	"	"	16c	.....	71.84

452.99

Alcona, Wm. Clark

640 #1 cedar ties @	33c	.....	\$ 211.20	
600 #2 cedar ties @	16c	.....	96.00	
				<hr/>
				307.20

G. A. Pringle, McIvor

700 #1 cedar ties @	33c	.....	\$ 231.00	
281 #2 cedar ties @	16c	.....	44.96	
				<hr/>
				275.96

E. Weinberg at Prescott

650 #1 cedar ties @	33c	.....	\$ 214.50	
700 #2 cedar ties @	16c	.....	112.00	
75 culls @	5c	.....	3.75	
				<hr/>
				330.25

A. Blumenau at Whitmore

420 #1 cedar ties @	33c	.....	\$ 138.60	
600 #2 cedar ties @	16c	96.00	
165 culls @	5c	8.25	
				<hr/>
				242.85

Odell at Taft

93 #2 cedar ties @	16c		14.88
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Yawger at Hale Lake

1260 #1 cedar ties @	33c	\$ 415.80	
1905 #2 cedar ties @	16c	304.80	
400 culls @	5c	20.00	
				<hr/>
				740.60

Welch

300 #1 cedar ties @	33c	.....	\$ 99.00	
150 #2 cedar ties @	16c	.....	24.00	
				<hr/>
				123.00

\$8,595.60

Brt. frd. \$8,595.60

354 Rose City

175 #1 cedar ties @	33c	.....	\$ 57.75	
800 #2 " " @	16c	.....	128.00	
150 Culls @	5c	.....	7.50	
				<hr/>
				193.25

Lupton

650 #1 cedar ties @	33c	.....	\$ 214.50	
1400 #2 cedar ties @	16c	.....	224.00	
700 culls @	5c	.....	35.00	
				<hr/>
				473.50

South Branch

350 #1 cedar ties @	33c	.....	\$ 115.50	
1350 #2 " " @	16c	.....	216.00	
400 culls @	5c	.....	20.00	
				<hr/>
				351.50

Pierce District

5706	#1 cedar ties	@	33c	.....	\$1,882.98
9111	#2 " "		16c	.....	1,457.76
1528	#1 hem. ties		20c	.....	305.60
2404	#2 " "		10c	.....	240.00

 3,886.74

Omer

1395	cedar ties	@	20c	279.00
76	Oak ties	@	30c	22.80

 301.80

Twining

331	hem. ties	@	20c	66.20
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 66.20

Pinconning

1304	#1 cedar ties	@	34c	443.36
5144	#2 " "	@	16c	823.04
6481	culls	@	8c	518.48
28	#1 oak ties	@	40c	.....	11.20
32	#2 " "	@	20c	.....	6.40
9	#4 " "	@	10c	.....	.90
7	#1 hem. ties	@	20c	.....	1.40

 1,804.78

River Rouge

6044	(#1 cedar ties	@	35c	
	(#2 cedar ties			

 2,115.40

355

Saginaw

2082	#2 cedar ties	@	18c	
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374.76

Cheboygan

1500	#1 Hem ties	@	24c	360.00
2500	#1 Tam. ties		16c	400.00

 760.00

 \$18,923.53

Brt. Frwd. \$18,923.53

2098 Hem ties	}				
175 cedar ties	{			874.39

Sold to Columbus Marshall & N. E. Ry.

8846 cedar ties & hem.	3,700.00
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Shipped to Wm. Ripley & Son, Chicago.

Carleton's Docks, E. Tawas.

1899	#2 and cull cedar	@	12c	\$227.88
300	#1 hem.		20c	60.00
664	#2 hem.		10c	66.40

 354.28

Tawas City

2500 #2 and cull ties @ 12c	300.00
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John Kennedy ties on skids T.-31-N.-2W.

503 @ 25c	125.75
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Dimmick at Tawas

1100 cedar ties @ 35c	385.00
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Water Dock, W. Bay City.

400 hem ties @ 26c	104.00
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Bay City and Vicinity

350 Brotherton Yard

6199 Wenona Beach

165000 West Bay City

171549 ties @ 30c	51,464.70
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75000 ties at Bay City at 25c	18,750.00
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Temple

4500 #1 Hewed ties at 33c	\$1,485.00
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356

1451 #2 " " 17c	246.67
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2748 5" #1 sawed ties 25c	687.00
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6991 #2 extra sawed 20c	1,398.20
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4270 mill run 30c	1,281.00
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19960	5,097.87
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Mackinaw Division

1200 #1 and #2 ties at 25c	300.00
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C. M. & St. P. freight claim—Estimated	4,000.00
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	\$104,379.52
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Deduction on ties

Cost of Kennedy ties on skids	50.30
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Estimated unpd. freights

Ry. Co. Gen 8 cars	451.53
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So. Bend 10 cars	350.46
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St. Paul 70 cars	2,989.56
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Sunds 44 cars	2,842.39
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	6,684.24
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	97,695.28
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Posts Inventory.

South Branch

2500 posts, 4" and up at 6c.....	\$150.00	\$150.00
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Taft

4471 posts, 4" and up at 6c.....	268.25	268.25
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Alpena

250 posts, small at 5c.....	12.50	
255 paving, 4" at 8c.....	20.40	
1746 " 4½" and up 10c.....	174.60	
6687 posts, 4" and up 8c.....	534.96	
	<hr/>	742.46

Twining

310 posts at 5c.....	15.50	15.50
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No. Crandon

789 posts at 5c.....	39.45	39.45
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Pinconning

357

69 Posts 7' 4½" and up 6½c.....	4.48	
5439 " 8' " " " 7c.....	380.73	
89 " 9' 7" 40c.....	35.60	
112 " 10' 7" to 9" 50c.....	56.00	
397 " 11' 7" 60c.....	238.20	
62 " 12' 7" to 10" 70c.....	43.40	
500 " 8' 4" and 5"-poor 10c.....	50.00	
	<hr/>	808.41

Temple

23697 posts 8' 4½" and up at 6½c.....	1,540.30
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River Rouge Yard

408 posts 8' at 10c.....	40.80
2281 8' posts 8c.....	182.48
1036 10' posts 14c.....	145.04

Dimmick

100 posts 7c.....	7.00
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Soo

	\$3,939.69
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Deduction on posts

Fr. on 15 cars—Estimated—unpaid.....	546.00
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	\$3,393.69
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Shingle Inventory.

Temple

1194¾ M Extra xax	\$2.50	\$2,986.87
133M C. B.	1.75	232.75
692¼ M S. B.	.90	623.03
53M Shorts.	2.25	119.25
		<hr/>
		\$3,961.90

Deductions on shingles

Est. frt. on 1 car unpaid	17.50
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\$3,944.40*Round Stuff Inventory.*

In River.

8 M posts, unpeeled at 5c	\$400.00
11 M mill cuts, at 18c	1,980.00
Muskegon stock	300.00
Uncut stuff in Temple yard	57.50
Park Lake Lumber	320.00
Leota Lumber sold and unsold	75.00
Phillips Bark	30.00
Round stuff paid for in woods	200.00
Phillips Logs " " " "	80.00

358

Symes Timber " " " "	200.00
Advances on stock charged to Round stuff to October 31/02	485.64

\$4,128.14

Wm. Marble	\$18.12
J. Meredith	8.52
S. Witherell	65.00
S. Shores	35.00
Carter	60.00
De Reeder	25.00
W. Phillips	55.00
D. Mulders	100.00
R. Miller	25.00
Rosician & Draper	25.00
Stand. Tie Co., Bill	69.00

\$485.64

Lumber Invt. at C. C. Randall & Co., Mill, Flint, Michigan.

3000 ft. 4/4 Pine	\$10.00	\$30.00
288 ft. 8/4 Pine	\$10.00	2.88
9900 ft. 4/4 hem.	8.00	79.20
850 ft. 8/4 hem.	8.00	6.80

118.88

\$4,247.02

All Gres Job Inventory.

3½M C. B. 16" shingle	\$2.75.....	\$9.62	
30¼M S. B. 16"	" 1.00.....	30.25	
1M 4 X 18"	" 3.50.....	3.50	
109¾M C. B. 18"	" 2.50.....	274.25	
1755¾M S. B. 18"	" 1.35.....	2370.26	
			\$2,687.88
3 Weeks' cut shingle timber, Estimated.....			600.00
594 16' posts, small top 15c.....		89.10	
460 8' " 4" 10c.....		46.00	
253 8' " 5" 12c.....		30.36	
			165.46
In Water at mill.			
89 16' posts, 10c.....		8.90	
356 8' " 4c.....		14.24	
			23.14
			<u>\$3,476.48</u>

Inventory Camp Equipage, Tools, Horses, etc., etc.

Muskegon River.

15 horses and harness.....	\$1,800.00	
Buggies, sleighs, etc.....	100.00	
359		
15 sets log sleighs.....	275.00	
Misc. Outfit, camp equipage, Blacksmiths' shops, blankets, etc., etc.....	1,500.00	
		\$3,675.00

G. R. & I. Job.

Camp equipment, office, horses, etc., etc.....	\$1,597.00
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Pinconning Yard.

Misc. Supplies & Tools, including 3 horses, etc., etc...	1,405.25
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River Rouge Yard.

Misc. Supplies and tools, including 5 horses, etc.....	938.00
Alpena Yard and Office.....	200.00
Temple Yard	150.00
Mill at South Branch.....	\$250.00
Mill at Cadillac.....	400.00
Bay City Office.....	1,100.00
Pembine Job Camp Equipage.....	300.00

\$10,015.25

Expense Account Inventory.

Unexpired Insurance Premiums as follows:

Boyne Falls	\$161.32	
Young & Folsom	66.54	
Alpena Yard	58.65	
Ross Yard	197.80	
Grand Trunk Ry. Stone Yd.	168.48	
Grand Trunk Yard	117.74	
River Rouge Yard	1,318.18	
Pinconning Yard	796.08	
	<hr/>	2,884.79
		<hr/>
		\$12,900.04

Trial Balance, October 31, 1902.

Accounts Receivable	\$73,115.18	
Personal Accounts	84,326.13	
Real Estate	54,055.44	
Inventory	10,955.52	
Tie Account	63,147.19	
Pole Account	121,107.08	
Park Account	554.12	
Log Account	520.76	
Wood Account	25.51	
Expense	70,500.39	
Discount	28,658.66	
Camps	5,782.03	
Shingle Account	3,014.17	
Home Drafts		
	<hr/>	\$383,849.63

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Bills Pay.	25,218.28	
Ad Vouchers	411.77	
Investment Account	88,293.16	
Post Account	1,291.88	
Lumber Account	1,728.38	
Pulp Wood	15.00	
Spile Account	1,255.00	
Round Stuff	8,050.32	
Profit & Loss	2,725.03	
Old Second National Bank	2,923.73	
	<hr/>	
Total	\$515,762.18	\$515,762.18

Profit and Loss Account.

Real Estate	\$64,778.18
Pole Account	78,414.43
Post Account	4,685.57
Round Stuff	12,297.34

Inventory	1,944.52	
Tie Account	34,548.09	
Shingle Account	930.23	
Lumber Account	1,728.38	
Pulp Wood	15.00	
Spile Account	1,255.00	
Profit & Loss Account.....	2,725.03	
Park Account		554.12
Log Account		520.76
Wood Account		25.51
Discount and Interest.....		28,658.66
Expense Account		70,500.39
An Gres Job.....		5,969.54
Profit and Loss.....		97,092.79
	<hr/>	
	\$203,321.77	\$203,321.77

Stock Investment Account.

Net Investment, Oct. 31 /01.....	\$88,293.16
" Gain for year.....	97,092.79
	<hr/>
Present Worth Oct. 31/02.....	\$185,385.95

Resources Oct. 31/02.

Accounts Receivable	\$73,115.18
Personal Accounts	78,356.59
Real Estate	118,833.62
Inventory	12,900.04
Tie Account	97,695.28
Pole Account	199,521.51
Shingle Account	3,944.40
Post Account	3,393.69
Round Stuff	4,247.02
Camps	5,782.03
	<hr/>
	\$597,789.36

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Liabilities, Oct. 31/02.

Home Drafts	\$383,849.63
Bills Payable	25,218.28
And Vouchers	411.77
Old Second National Bank.....	2,923.73
Net Present Worth.....	185,385.95
	<hr/>
	\$597,789.36

Recapitulation.

Resources	\$597,789.36
Liabilities	\$412,403.41
Investment	185,385.95
	<hr/>
	\$597,789.36 \$597,789.36

That was supposed to be a correct inventory. By "supposed to be," I mean it was as correct as we were able to make it; we were supposed to be making as actual a count of our timber as it was possible to do; the entry showing that the timber was inventoried at \$118,815.50 is based upon actual estimates of the timber on the lands; these estimates were made by different men,—different foremen; those men were competent to make the estimates; those foremen were William Werner, William Doan and Slocum; I say that the entry "Timber in the River Rouge yard \$98,642.77" was practically correct, as near as they could count it; as to who furnished the information upon which that was based. I don't remember whether Mr. Connley was in charge of the yard at that time—that was Peter Connley; they had another man after Peter Connley, I don't remember his name; as to the entry "Poles \$206,218.63, net Poles \$199,530.51," we got at the amount \$206,000.00 by actual count; the gross amount of poles probably was the amount on the yard of all the poles; there were some poles of the American Tel. & Tel. people that we stored for them and most of the money had been paid on them, and the net poles would be those deducted from them; the net poles belonged to the company; there was no claim against them and there were no liens on them; they were not encumbered in any way. As to the entry "Ties \$101,307.00, net Ties \$97,369.80," the difference in ties might have been some that wasn't shipped out belonged to some different companies, would make the difference between the net and the gross; we had that many ties; they were situated at Boyne Falls, Alpena, Sheboygan, all up and down the Michigan Central road, Bay City; they were supposed to be all marked with our mark, they might have been; we had a custom of marking it all; as soon as we acquired the title the ties were supposed to be marked and the poles as well; I say as to the net value of the Maltby Lumber Company, after all debts were paid stated at \$182,395.85, that value was there; the business of dealing in cedar ties, timber and telegraph poles went down somewhat after October, 1902, became less profitable; I don't know that there was much change in the business generally; it was as good afterwards as it was before, generally about the same; but I think this particular business went down, if that was the time the bank took hold of it; that was on account of the change in the business and not on account of the general business conditions; that inventory, dated October 31st, 1902, was made for the purpose of a settlement of the year's business; that inventory was not prepared at the request of the Old Second National Bank; at that time, I was contemplating forming a stock company, putting our business into a stock company so I could get a rating; to my knowledge no property mentioned in that inventory was put in at anything different from its true value.

Q. Now coming to the lands, it seems that in the inventory of October 31st, 1902, real estate was listed at \$54,055.44; on the next page there is a charge and credit under Profit and Loss Account Real estate \$64,788.18, that amount being credited to profit and loss; then on the last page,—Resources, October 31st, 1902,—Real estate

\$118,833.52, so it seems that the amount of the real estate was raised from \$54,055.44 to \$118,833.52, why was that done?

A. In the first instance we merely put in the real estate at a nominal value.

It was put in at a nominal value because we did not care to show any excess or any over; I don't know particularly why, but it made no difference at all so far as we were concerned, so far as our business was concerned, whether it was put in at one value or another; it made no difference because we had no reason for making it any larger, it all belonged to us anyway; the change in figures from fifty-four thousand and odd dollars to one hundred and eighteen thousand and odd dollars was made because we contemplated at that time of making a stock company of the concern and putting it in at what we considered nearly its value; I think that the real estate that the Maltby Lumber Company owned at that time, with the timber on it, was worth more than one hundred and eighteen thousand and odd dollars as stated in the inventory; I say it was worth more than that because it was increasing in value right along, all of the time, and the timber itself was increasing in value; from my experience as a lumberman, I say that timber increases in value continuously; it increases in value because it gets scarcer all the time;

363 every piece of timber that is cut is pretty apt to increase the value of what is left; the value of the lands would also increase; Sage was holding those same lands, similar to our own as high as ten dollars an acre; these lands were only put in at five dollars an acre; some of the Sage lands adjoin ours. In my judgment, taking all of this property at a fair and honest valuation, as of date October the 31st, 1902, I believe that I had a surplus over and above my liability of \$183,000.00; supposing that I had continued in the management of that business, giving to it the same attention after 1902 that I did before, retaining the same customers and handling my business in the same way, I believe, in my judgment, it would have paid all the bank owed and left me a good big surplus besides. I managed the business for the bank for about a year afterwards at a salary; in some cases, during that year, I followed by own judgment, but in a good many I followed the directions given me by the bank; I was curtailed to a great extent by the directors of the bank; I was curtailed in the way of cutting down the business,—cutting down the business in not being able to buy stock and turn it over,—take new contracts; the business was conducted differently from October, 1902, from what it had been conducted the previous year in that the bank had a man in charge there at the time; Lewis was in charge of the business; he took charge in January some time,—January, 1903; and there was another man out in the woods; practically, he was over me; that was Carswell; he was in the employ of Davidson, the president of the bank; when our judgments differed, sometimes his and sometimes my judgment prevailed; I do not think he had any experience at all in the business such as I had been doing; he had been a timber scaler of ship material; I don't know that he had had any experience in anything else; Davidson was a shipbuilder, and that was the only man for whom he dealt in tim-

ber; nothing was concealed from this inventory of October 31st, 1902, nor nothing was added to it that ought not to have been; I acquired this extensive business with these companies by my going to them; Mr. Bump became president of the bank a few years before his death; my business with Mr. Bump was transacted in the same way after he became president as it was when he was cashier; Mr. Bump was the managing man in the bank all of the time, so far as I know; my inventory had been prepared before November, 1902, when I was called before the directors of the Second National Bank, and without reference to my being called before them; there was nothing suspicious, that I knew of, in that inventory of 1902, neither then or now; I was examined as a witness in this case on the 364 trial at Bay City, and I was examined and cross examined with reference to this inventory; I don't know that the business being curtailed affected the disposal of the property so much, but we were not able to buy other property,—ties and poles; it was the intention to close out the business rather than to keep it a going concern; and when I speak of a curtailment it was because of its being closed out; it was the intention to close it out instead of continuing the business; I have known Frank P. Chesbrough ten or fifteen years, and I have known J. W. McGraw about the same time; Frank P. Chesbrough and J. W. McGraw, as directors of the Second National Bank, or in any other way, never had anything to do with me in reference to this business, my indebtedness to the bank, or this property, until after October 31st, 1902; so far as I know, they had nothing specially to do with me after that time; my business with the bank, after October 31st, 1902, was done with Andrews; I don't remember that Bump left about November, 1902, but he went away on a vacation first for six months; and then I think he didn't come back, that is my recollection. Mr. Columbus C. Barker was a successful lumberman; and the firm of Smalley and Woodworth was understood to be successful; while they were in business and while I was doing business with Mr. Woodworth, we were very friendly; I consider that I accommodated him quite often in discounting paper for him; I was associated in business with him and with the firm of Smalley & Woodworth in Michigan and in Canada; we bought a piece of timber and lumbered it in Canada,—lumbered it together; at that time Frank Woodworth did his business at the Old Second National Bank, and I did my business at the Old Second National Bank; the operation in Canada, I think, amounted to some thirty or forty thousand dollars; as to the period of time covered by that operation, I don't remember the dates,—commenced about a year or a year and a half before the bank took charge, possibly about 1900 or 1901; we bought the timber together; and we lumbered a part of it; we sawed the logs; I turned over my interest in the balance of the timber standing there to Mr. Smalley and Woodworth; we bought quite a number of small pieces of land together in Michigan; generally, when we bought this timber, they gave me their paper and I discounted it,—paid the cash for it; my credit was good at that time; the business was done mostly through the Second Na-

tional Bank; we discounted some paper in the other banks; the extent of the Michigan business, in which Smalley & Woodworth and myself were engaged amounted to probably twenty thousand dollars, possibly more, I don't remember exactly; that was
365 about a year previous to the Canadian business; I don't remember when the firm of Smalley & Woodworth went out of business; during that time, I sometimes helped Mr. Woodworth in his own business by getting his paper discounted and giving him the proceeds of it; he would make his paper to me and I would endorse it and get the proceeds and return it to him; that business was mostly done through other banks rather than the Second National Bank; my credit was good at that time,—too good; these accommodations that I put through for Woodworth amounted to forty or fifty thousand dollars, I think; he came to me for accommodations because we were very intimate with each other in our business relations; he would come to me sometimes and say that he didn't know how he was going to meet a certain paper, and I thought I could get it for him and did so; I have never had any differences or trouble with Mr. Woodworth after this trouble; I know Mr. Collins of Bay City; I have known him twenty years,—twenty-five,—during all my transactions with the Second National Bank; Judge Holmes was President of the State Bank and its counsel, and after his death, Mr. Collins, his law partner, succeeded him as counsel for the bank, I think; I knew Captain James Davidson, the ship-builder and president of the bank; I do not remember the exact date of the execution of the chattel mortgage to the bank.

Q. Chattel mortgage and bill of sale; well, it seem to be dated in June, 1903, page 238. How did that come to be given?

A. It was by request of the bank. They asked it.

About the same time Alzina Maltby gave a trust deed to the bank; the lands were deeded to James Davidson as trustee of the bank; I think the face of the deed showed that he was trustee, I won't be sure that I remember the wording of it now.

Q. I will ask you to read the bill of sale, Exhibit "76" in the trial, and the chattel mortgage, Exhibit "77" in the trial, and then I will ask you some further questions about it. Mr. Maltby, after reading these exhibits, does it recall to your mind the circumstances under which they were given?

A. Yes, somewhat.

They were given at the request of the bank; they turned over about everything I had in the world except my homestead and exemptions; after that time, which was in 1903, they left, to a certain extent, the management of the properties to me, that is, just the closing out of the business,—winding up of the business; they had to consent to everything that was done; I don't remember selling any lands during the year that I was in the employ of the bank; from the
366 time Mr. Lewis went into the office, he had charge of everything there,—opened the mail, I did not handle any of the moneys that came in after that.

Q. How did it happen, that after these accounts had been assigned to the bank, that is the account against these different com-

panies you have mentioned, for poles, ties etc. had been assigned to the bank, that some of the drafts, in payment of this property and on these very same assigned accounts, were sent to the lumber company, or it is claimed that was done;—what is the fact about it?

A. I don't know that I understand that question, Mr. Weadock.

Q. Well for instance, you would send a bill for poles to the American Tel. & Tel. Company, make a draft upon that company, with the inspection certificate attached to it, and with the bill of lading and this inspection certificate, discount it at the bank; the account being assigned to the Second National Bank, and the remittances, when made, it is claimed, were, in some instance, made direct to you or to the Maltby Lumber Company. State how that happened to be done.

A. Some of them did it in that way. I think the Western Union did.

I don't remember how many of them; they just preferred that way rather than the other; refused to;—I mean they refused to recognize the assignment; I think the Western Union and the American Tel. & Tel. always remitted to Maltby Lumber Company; when I received those payments, I always took them to the bank; there was no instance when that was not done; it made no difference whether the remittance was made upon these drafts or for this material that did not go to the bank, whether it was addressed to me or to the bank or to the Lumber Company; during the year, 1902, Mr. Slocum was principally in charge of my business at Bay City; the last year, Mr. Regan kept the books mostly, but it was under the supervision of Mr. Slocum; Mr. Regan did the work; as to the competency of William Doan, William Murner, Peter Connley and the other foremen that I had in my employ, I would say, that Mr. Doan and Mr. Murner were practical men, having worked in the lumber business for a great many years as foremen for other people, Mr. Doan in particular; Mr. Doan had only worked for me as foreman. Mr. Connley was yard man,—had charge of the yard at Detroit; they had special knowledge as to telephone and telegraph poles and ties,—they had practical knowledge of it from getting it out from the stump and inspecting it and in looking after the shipments of it; the different inspectors that were in my employ were considered to be competent men; I considered them so; I don't remember whether we actually owned any mills on October the 31st, 1902, or not; we had quite a number of mills sawing for us; I mean by sawing for us, 367 that we furnished the shingle material and they sawed them for us by the thousand; I think afterwards, we were obliged to take over some of those mills in order to protect ourselves; that happened because they were in debt for the mills and we had to pay up the indebtedness in order to keep the mills; they had bought the mills of someone else, but they were owning upon the mills and were likely to lose them and we had to pay for them; having paid for our timber at that place we were obliged to take those mills; I think some of those mills were owned by us previous to October 31st, 1902, the date of the first inventory; the shingles mentioned in that inventory, were properly inventoried; I am familiar with the shingle business;

I have dealt in them twenty-five years; I don't think there is anything, from first to last, stated in that inventory of October 31st, 1902, that is not stated at its fair value,—I think there are many things that could have been valued at more,—that were worth more; not to my knowledge is there anything mentioned in that inventory that I did not own at that time; there was no claim for purchase money any note, or lien or of any other sort against any of that timber at that time,—might have been some account we owed, but very little,—very little, everything in that inventory was practically paid for; all of this different property had been inspected; nothing listed in the inventory was property that had been thrown out, or culled, or did not properly belong in the inventory, there was nothing in there that did not properly belong in there,—there was no earthly stuffing; some of the timber mentioned in this land book had been purchased by me with a time limit for its removal, but I considered that we had enough time allowed in each case to have removed the timber; after I left the employ of the bank, in dealing with this property, I had nothing to do with the sale or disposition of any of it.

After that I came South and engaged in the timber business; in a general way, there was probably ten or fifteen thousand dollars in unpaid taxes against these lands October 31st, 1902, I won't be positive about that, there might have been less than that; I think that would be a very large estimate; the deed to James Davidson conveyed practically all the land to which I had title as the Maltby Lumber Company, or in my own or in my wife's name, a few tracts not conveyed, but first and last, all was conveyed.

Q. Turning again to the land book, I find on page 1, a number of red ink entries, for instance C. O. N. T. to I. A. M., with ditto marks; W. D. to I. A. M., to which I invite your attention. Do you know who made those marks?

A. I presume Miss Hessey, she was in charge of the land book at that time.

368 I do not think I would remember her writing, it has been so long; I. A. M. stand for I. A. Maltby; that is Irvin Maltby, my son; there was an indebtedness of about four thousand dollars due to him; that was for accumulated wages; he left them with the company, all of his savings; he worked with me five or six years I think; in 1902, I think he must have been twenty-one or two years old; I don't remember exactly, yes, he must have been more than that,—twenty-five years old; he is married and lives at Cleveland, Ohio; the red coloring on the map opposite page 1, to which you call my attention, indicates the land and all,—where we own the land and all, and the blue just the timber alone; I mean, the red is where we owned the land and all the blue is timber alone; the map opposite to page 2 to which you call my attention, that is the same,—the color is the same; I think that prevails throughout the whole book; that book was supposed to have been kept accurately.

Q. I find a notation on the map opposite page 3, "bought in John Stoddard's name, 12/3/03." Was Mr. Stoddard, at that time, your attorney, or had he been before?

A. He had been my attorney all through those lands on there;

I think Mr. Stoddard bought those lands under a tax sale and were to divide the profits; the company had nothing to do with it.

What I have said with reference to the colorings applies to each of the maps throughout the book; the maps as showing the water streams are very accurate, she was very careful in making the maps correctly; the entry on page 5,—“timber deeded back to John Decker by A. Maltby, July 26th, 1905,” I presume that was some timber we bought of him and afterwards he wanted to buy it again of us and we deeded it back to him; it was deeded by the consent of the bank; any timber that was deeded to anybody at that time was by the consent of the bank; I conveyed to no one any timber or land or any property on my own account after January 1st, 1903, after I had turned over everything to the bank; as a rule the taxes against particular descriptions of the land mentioned in the land book were mostly small amounts; the entries on page 9 showing a number of parcels of land bought July 1st, 1902, and with the items of one thousand dollars opposite each description, some of that was the amount we paid for them; and the two hundred dollar entries opposite certain other descriptions, I presume that was the amount we paid for them at the time; the entry on page 10,—“East half of northwest quarter, Section 7”—in red ink,—“contract to I. A. M. purchased from W. C. Webber,”—amount two thousand dollars,—“sold 12/14, 1904.” I think that was the Barker lands; I had nothing to do with turning it over to my son; that was the land Mr.

369 Barker bought of Mr. Webber or put up the money for us; the timber on these lands was mostly cedar, some pine, some hardwood, tamarack, hemlock; telegraph and telephone poles were made from cedar, and railroad ties are mostly made from cedar,—some hemlock and tamarack; very few from oak, because there wasn't any there; I presume, through that land book, where the amount is stated opposite a particular piece of land, that indicates the amount paid for it; on page 19 where there are a large number of descriptions of land, and the amount four thousand dollars is stated at the top, and dittoed down for several lines, I think that means that four thousand dollars was the consideration for all of that land; I don't think the amount of taxes which I have estimated which stood against the land in 1902, was set forth in the inventory as a liability; this was not done because we considered the land was worth the amount that we inventoried it at besides the taxes; the lands were worth the highest amount given to them in that inventory, irrespective of the ten or fifteen thousand dollars of taxes against them; I remember the list of lands on page 24, purchased from Harting and Prescott, with the consideration stated at four thousand dollars; in my judgment they were worth a good deal more than that; they were mostly hardwood lands; lands from which most of the pine had been lumbered; as timber grew scarcer the pine that would be left in one year would be cut in a later year; Prescott lived at Tawas; he carried on a lumber business; the list of lands entered as purchased from C. C. Barker and wife, with the consideration named at five thousand dollars, I think that has reference to I. A. Maltby's lands; I don't think that has reference to my lands at all; I believe that lumbering

was done under the name of I. A. Maltby; the list on page 38, Lot 3, Block 13, Lower Saginaw, purchased from Martha Buck, for two thousand dollars, that was the homestead; the different figures stated in the column marked "Amount" at the top, shows the original cost to us, I think,—that was the intention; the purchase from William F. Johnson, on page 46 of the land book, bought in 1902, for which the amount paid was thirteen hundred dollars, I think that is all right,—Johnson lives at Roscommon; the short sheets in that book, on the front page of which there is a map and on the reverse page there is a state tax list showing taxes for the different years, that is supposed to be the way in which we kept a record of the taxes; that book was made to order for my own purposes; there is no place in that book where the entire purchase money is footed up; those smaller sheets with the tax list shows the taxes on each description; I remember the purchase listed on page 52, from N. B. Bradley & Sons, with the purchase price of \$8,057.91; that was worth a good deal more than the amount paid for it; the taxes on those descriptions

370 were all paid; where lands were held under a tax deed that book shows that they were so held; and it also shows where they were bought from the person whose name is given; the sheet pinned in opposite page 56, with certain cards and descriptions,—“sold to W. A. Stoval by Warranty Deed,” I think that has been entered since that,—since I had anything to do with it; all that handwriting in red ink, I know nothing about it, I think that has been entered since; I don't know anything about the head of the paper, bill of sale C. M. S. Cate to Porter & Burple; I don't know whose handwriting it is; I don't remember particularly the purchase mentioned on page 57 of the land book from Spreckhart & Fartenfellow, seventy-five dollars; the descriptions on page 57 held by tax deed in D. J. Reagan, that is the man I spoke of as book-keeper; those lands were purchased in our interest and deeded to him and he afterwards deeded them to us; I think that was some of our lands; we paid up the taxes and the deeds were taken in his name, because we could not get a tax deed on our own lands; the purchase listed on page 65 from U. M. Guilford, fifteen hundred dollars, that was from Guilford of West Branch; that was all in June, 1903, and the land is in Otsego County; they are marked in blue, I think the blue was the timber and the red the land, as I remember now; the recital on page 65, “Cedar and Spruce timber, May, 1906, we to pay half the taxes next three years, all timber three years from date to remove, cedar on time,” does not indicate that we owned the land; that would indicate that we owned just the timber; the list of land on page 70 purchased from Bradley, with no amount stated and no other information as to the map, and the entry on page 70 cut to April 4, 1908, that indicates timber on a large tract of land, I think some thirty or forty thousand acres; I don't know why the purchase price is not put on there,—forty odd thousand dollars, I remember now; “one dollar,” the amount stated at the head of the list, that is just the nominal consideration; that was purchased by I. A. Maltby and then afterwards turned over to the bank; the red cross on the blue shadowing means delinquent taxes; that being at the last part of the book indicates

that it was one of our old purchases,—I think that was the last,—about the last; during the year that I was in the employ of the bank following October 31st, 1902, there was about two hundred and fifty thousand dollars paid to the bank from the proceeds of this business,—that is, the indebtedness was about that much, in addition to the expense of the business; at the first meeting, when I was before the directors of the Second National Bank with the inventory, it seems to me that Chesbrough was there; I don't remember whether

371 McGraw was or not, still I won't be positive about either of them; I did not hear the testimony that Mr. Foss gave on the trial of this case; I don't know what there was about the statement made by Mr. Foss on the trial when he stated "We discovered that there was a large difference between the amount that Maltby represented these several companies owed and the amount which the companies represented they owed"; I presume I submitted a statement about October 31st, 1902; there would be a difference in the amount that they would owe by being in transit; on our books they would be charged with all that was in transit or not; all that would show on their books would be what would be received. Some of this timber they inspected themselves; some of them inspected it before it was shipped to them and some of them when it was received by them.

Q. And if they credited you up when it was inspected by them, after it was received by them, you would have a credit with them until it was paid?

A. No, not some of them I wouldn't.

Q. But on your books you would have a credit when you shipped it out to them?

A. Yes, sir.

Q. Mr. Foss testified on page 423 of the printed record, as follows: "I don't know whether we had found out all about the Maltby paper in May, 1903, or not; we had undoubtedly found out a little; Maltby lied and made misrepresentations; we found that out in 1902." What do you say to that Mr. Maltby?

A. I don't say anything.

When he says "Maltby lied," I don't say anything to that; I wouldn't say whether I lied,—he has a bit; there was nothing in the inventory that was not stated correctly; I don't like to state whether there was anything in the matter of the indebtedness of the different companies to me that I knew and misrepresented; on October 31st, 1902, and up to the end of the year 1903, in my judgment, the bank had a good deal more than security for all that the Maltby Lumber Company was owing to it.

Cross-examination.

By Mr. Clark:

My recollection is not claimed to be accurate as to dates; as to the date when I say that I was associated with Mr. Woodworth in this Canadian timber, that might have been earlier or later, I don't remember the exact date.

Q. Referring to this land book which you say you had made for yourself; this is one of the series of books, some account books and some record books, that were designed especially for your business by a firm of expert accountants?

A. Some of the books were designed for us.

It is true that we did have expert accountants there prior to 1902, and they devised a system of bookkeeping which they and we thought was especially suited for our business; the main object in
372 view in devising this system was changing over from one system to another. Mr. Slocum had that changed entirely and his object was to simplify the keeping of the books and make it show more thoroughly the business; the business was quite a complicated business; it was quite extensive and complicated and these books were, to a certain extent, I suppose, devised to show, from day to day and week to week and month to month, what we had on hand, what we had shipped and what was in transit and what we had sold; we had a system of inventories that came in very frequently; generally, once a week I think, and generally, from the camps whenever we called for them; and these were entered in our record books to a certain extent; there were places designed for that purpose; we endeavored to keep our land book up to date; any transactions of the land, any sales or purchases were supposed to go on the land book; when I had the trouble with the bank in 1902, and when Mr. Lewis went in, in January, 1903, I turned over to them whatever I had in the way of books and records and accounts; I don't remember of concealing anything; I don't know that one of the first things they did was to investigate the condition of my business as shown by the books, they probably did; I don't know that they did that much, I suppose they did; he was there to take charge of the business, sell all the proceeds. Referring to my testimony that McGraw and Chesbrough had no particular dealings with me, they acted practically in the same way toward me as the other directors of the bank did; Mr. McGraw was a little more active than the others and tried to hire my men away from me and in trying to see to the business himself; that happened soon after the bank took it over from me; I think Mr. McGraw travelled around through our camps to some extent checking up; he went without my knowledge; I don't know when he did that; I suppose it was either in 1902 or 1903, I don't know, he didn't tell me about his going there; I say he didn't tell me about his going there; I suppose it was in 1902 or 1903, if he went there at all; so far as I know, Mr. Chesbrough acted with the other directors; and he and the other directors, and Mr. Andrews, all had access to whatever there was of my business after the first of January, 1903; when I speak of my acquaintance with Mr. Woodworth as being somewhat intimate, I mean during the time I was engaged in those lumber operations with him; I was not intimate with Mr. Woodworth after the Mosier failure; I don't remember when the Mosier failure occurred; some years before 1901 or 1902; I do not mean to say that Mr. Woodworth had knowledge of the details of my business in 1902, or for some years before that time; after the Mosier failure, Mr. Woodworth had very little knowl-

edge of my business; when I contemplated the formation of a corporation in 1902, I had not tried to interest anyone in the formation of that corporation, except my own family; my son and myself; I may have mentioned it to Mr. Bump; I don't know that I mentioned it to Mr. Davidson; I don't think I mentioned it to McGraw or Chesbrough; I don't think they knew that I had this plan in contemplation; the Maltby Lumber Company was never a corporation: its business commenced before my bankruptcy; I didn't do the business in my own name; I called it the Maltby Lumber Company, instead of doing business as Alzina Maltby because Mr. Fox and Mr. Black were partners in the business, they had been clerks in my office before that; I don't know that they put in any capital particularly, only their working wages; they drew a salary; my wife had no cash capital, and I had very little cash capital; had a little mortgage on my home; it was more than a thousand dollars actual cash,—I don't remember, I think some two or three thousand dollars; Mr. Black and Mr. Fox pulled out again in a year; when they pulled out they just took their salaries with them; I don't remember what the capital in the business was at that time; it was not very much, I think some three or four thousand dollars; probably my credit was not good at that time; we didn't ask any credit at that time; I defaulted on my obligations at the time of the Mosier failure, not previous to that, and I was owing some that I could not pay. I had never defaulted in my obligations at any other time; I could not tell you how much the Second National Bank lost of paper I was on prior to the business of the Maltby Lumber Company,—not a great deal; in 1896, when they charged off ten thousand dollars of Maltby and Mosier paper, and in 1897, nine thousand nine hundred and sixteen dollars of Maltby and Theodore E. Hines, I presume those were correct; I don't think they lost anything; I think we paid part of it, I don't remember how much; I think we paid part of the Mosier loan and I don't know but what we paid them all of the Hines loss; they charged it off after it was paid, I suppose; I wouldn't say positively we paid them the whole amount, but I think we did; there might have been an account standing on the bank books when we opened the account of the Maltby Lumber Company; I don't know how their books were; they might have charged it off; I don't know what Mr. Mosier's indebtedness was to them, or what paper he had in there of my endorsement; afterwards I compromised with Mr. Bump and paid up.—I don't know how much; I presume there was some net loss left, I don't know how much; I think on the Hines paper it was practically none, but I don't think it quite paid up the Mosier paper in full; I don't think the company ever had a commercial rating.

374 Mr. Weadock: Do you mean a capital rating or credit rating?

Mr. Clark: I mean a credit rating,—either capital or credit rating, in Dunn's or Bradstreet's, or any other commercial report:

Witness: It seems to me that we did have a rating there of ten or twenty thousand dollars; I think we had that through most of the last years of the Maltby Lumber Company; I am not willing to swear to

that; I won't be positive about that, that is easily ascertained though; if Mr. Andrews testified that I had no commercial rating, I don't know that I would rather rely on his recollection than my own. If Mr. Andrews testified that I didn't have, I would think that he would be positive about it, but it seems to me we did have a commercial rating; Maltby Lumber Company, A. Maltby had a commercial rating of ten thousand dollars right along; A. Maltby is myself. Previous to the Mosier failure I think I had a commercial rating of ten or twenty thousand dollars, and after the failure, I don't know whether I had any rating or not; I don't know that I was insolvent; my best recollection now, after thinking it over, is, that after the Mosier failure I didn't have any rating; that is, any capital rating; we had a good credit, could get anything we wanted; paid cash for all of our stuff; I think most of the directors were at the meeting when I presented the inventory of 1902,—in the fall of 1902,—; there was a good many of them there; I don't remember whether that was a meeting called by any previous arrangement or not; I know I was there at that time; I think that was the first time that the directors seemed to take a position of antagonism or suspicion towards myself; I don't remember that they asked me not only for this 1902 inventory at that time, but also asked me for some trial balances and other matters going back to previous years.

Commissioner asked to mark a paper Exhibit "Maltby 1."

I think this is the balance sheet for different years; I think it is the balance sheet taken from my books down to 1902; I don't know that a sheet like that taken from my books was submitted to the directors at that time; I don't know that it was; I don't remember anything excepting the last one submitted to them; might have been the whole thing; I don't remember now, only just the last one submitted to them; I don't know that they asked for anything more; as I look it over it impresses me as a correct statement of the balance sheet,—as I remember it; I don't remember that I was questioned about these facts at that meeting,—balances for the previous years and what my business and history had been for several years; I

375 was; I don't know whether I gave them that information verbally at that time or not; I don't remember that anything of the previous years was talked about at all; I don't know whether they got that from my books afterwards or not; I don't remember that they got it at all; I think it is true that the Maltby Lumber Company was worth four thousand two hundred and eighty-four dollars and sixty-six cents, or thereabouts, on October the 31st, 1897, as shown by that sheet; and I think it made a net profit for the year 1898 of five thousand and thirty-eight dollars and fifty-six cents; and the next year, 1899, I think they made a net profit of thirty-five thousand nine hundred and thirty dollars and twenty-two cents; and in 1900 they made a net profit of fifteen thousand three hundred and ten dollars and eighty-one cents; and in 1901 I made a net profit of twenty-seven thousand seven hundred and twenty-eight dollars and ninety-one cents; and in 1902 I made a net profit of ninety-seven thousand and ninety-two dollars and seventy-nine cents, that was by

increasing the price of the land; by making the prices of the land that made the profits of the last year the large amount; it was not the same way in other respects the years before; there was nothing else marked up this way; the 1902 inventory shows that personal accounts amounting to seventy-eight thousand three hundred and fifty-six dollars and fifty-nine cents were carried as a resource, I think these personal accounts were accounts receivable.

Q. Well you had an account called "Accounts Receivable," and another one called "Personal Accounts," and personal accounts were accounts that you had paid to jobbers and charged against them on account of your lumbering operations, were they not?

A. I don't remember exactly what they were; Personal Accounts would be any personal account, I suppose, on the book. We made advances of a good many of those, and I presume some of those might have been uncollected personal accounts.

Accounts personal might have been what was due from other people for sales we made to them; I don't just remember now how those were kept; accounts receivable contains the American Tel. & Tel. Co., the Ann Arbor Railway Co.; accounts of that kind was the amount of money due, or claimed to be due for merchandise sold; Personal Accounts contained such an entry as Alpena and Northern Job, Ames and Bump, James Bell Job, Bently & Company, we advanced them money to buy material with; the items of Personal Accounts might have been amounts advanced to various people, and all other personal accounts whatever they were; the total of seventy-eight thousand dollars of personal accounts meant an asset to me,—that is what was owing; it meant what others had

in their hands to account for; who I think had earned it all;

376 I don't account for the fact that practically all of that item

"Personal Accounts" of upwards of fifty thousand dollars was afterwards charged off to Profit and Loss; I didn't know it was charged off to profit and loss; as to accounts receivable as to separating the good from the bad, I didn't know that we had any bad. I don't know that we had made any separation up to that time; I didn't suppose we had any bad bills receivable; the accounts called "Camp Accounts" and the "Yard Accounts," those were representative accounts meaning where money had been paid in the operation of this or that camp or yard; I testified before that immediately after this discussion with the Board in November, 1902, when the October inventory was submitted, it was determined to take possession of my property, and put Mr. Lewis in the office and close out my business and apply the proceeds of it upon the payment of the debts that the bank had, and it is true; cedar usually grows on swamp lands; sometimes you not only have to have good cold weather, but that weather must come before a good heavy snow fall,—not necessarily; we generally work our roads and make a foundation to them by travelling over them; I don't think that increases the expenses of operation; I don't think the cedar business was a business that was more speculative than the ordinary business; I don't think there was more uncertainty; I don't think there were any more elements of uncertainty in that business than any

other; there is not so much fluctuation in the demand and supply for ties; as to the market or sudden fluctuation in price, the contracts were generally made in the Fall of the year for our material and did not fluctuate but very little; it is not true that one of the reasons for my having purchased the cedar was the attempt to control the market in that vicinity so that I could control prices to some extent.

Q. If Mr. Bump, in 1902, wrote a letter as follows: "This line," referring to your line of discount "is double the amount we expected to run it and will be cut down largely; Mr. Maltby had made contracts to take ties and cedar poles delivered between certain points on certain railroads, in order to avoid competition, but the amounts delivered were so much greater than expected that the demand on us was proportionately large." What do you say to that? Is that true or not?

A. To a certain extent yes; all of those ties and everything there, I think was contracted for or principally, practically contracted for ties.

As to taking all ties that were to be delivered between certain points, we tried to control all of the ties we could on all points, that is, tried to keep out competitors on the G. & I. railroad; we took contracts for that road, and no one else, for all ties on that road;

377 I think that was understood by the bank; as to that tending to swell the production of the ties, where we controlled it, we thought we would get more ties than we did if we didn't; we had a contract with the G. R. & I. road for all their ties and we had to work hard to get that amount; there was no over production; we were obliged to ship in some from other roads; we naturally made more money out of ties we lumbered ourselves than those we bought.

Q. How about your own lumber operations where you had bad weather conditions, etc.? Ever lose any on that account?

A. Might have cut some more, but I don't know whether we lost any money out of it.

I don't know that the trial balances showed I had accounts lost for certain years, I don't think so; I don't think there were any of those losses; where I had bought merely the timber or cedar with a limited period within which to remove the timber, of course, if I didn't remove it, I would lose my rights; and in some of those contracts I had I was obliged to pay the taxes and some of them not; and if I didn't pay the taxes where it was a part of my agreement, I would forfeit my title in that way; where I purchased land from others, in some cases the sellers might have had tax deeds of the land,—very,—very seldom, I think; where the land book shows that I bought from an individual, in most cases it means that he had the government title, but not always; there might be an extreme case where we bought of someone else who had only a tax title; at that time, I think it was not understood that tax titles were questionable; I think the tax title was considered good.

Q. Why did you buy anything then but the tax title?

A. Because we would get the original title.

Sometimes tax titles were cheaper than the original title, some-

times not; the entry on my land book, where it appears that I bought lands in Otsego County, Township 32, North Range 2 West, in the name of my clerk, D. J. Regan and paid \$291.40 for the tax title, I think that land was worth more than that; I don't remember now how much it was worth, but there is an estimate there on the land book; if it is inventoried in my 1902 inventory at two thousand and fifty dollars, I think it was worth all we inventoried it at; if we had only paid a hundred dollars, it was worth it; the inventory is made on the standing timber by competent men and values put on them what they thought they were worth; the Harting and Prescott land that I spoke of and that I bought for four thousand dollars, I think that was in Prescott Township; at that time I considered it worth considerable more than four thousand dollars; three or
 378 four times that amount possibly, yes, ten times that amount; most of it was hardwood land, good farming lands, and there was a good deal of timber on it; I included my land in the 1902 inventory for what I thought it was then worth, for the purposes of incorporation, absolutely irrespective of what it cost me.

Q. And irrespective of the condition of the taxes?

A. I considered it was worth that over and above the taxes, whatever the taxes were on it and there wasn't a great deal of taxes on it; there was other land right adjoining it being held at ten dollars an acre and I inventoried that at something less than five dollars an acre; Mr. Carswell, the bank man, didn't agree with me on some values; he wasn't a land man and wasn't a timber man; in some cases, I think, he agreed with me and in other cases he might not have done so; they took an inventory the next year afterwards and cut it down considerably, making an inventory of one hundred thousand and some odd dollars as against an inventory of ninety-five thousand the year before, or leaving that surplus over and above the indebtedness; during the years that I say I was making money very rapidly, as shown by that statement, my debts to the bank were also increasing very rapidly, the more business we did, the more we borrowed from the bank; the more money I made the more I owed,—the more money it took to run the business; I think in most instances, I was discounting my paper at seven per cent; I think that is what we paid.

Q. And your indebtedness to the bank or that of your wife,—wherever I say "your" or "Maltby Lumber Company," I refer always to Alzina Maltby, doing business as the Maltby Lumber Company, was four hundred and sixty-six thousand dollars in June, 1902?

A. I don't remember that amount.

I would not say that was wrong; we were trying to reduce it and the bank was trying to reduce it, I don't remember whether it still amounted to over four hundred thousand dollars in October, 1902; but I would not say that was wrong; I don't remember what it was; I don't think we owed but very little to jobbers or to any one else outside of the bank.

Q. Run your eye down this column here, marked outstanding notes, March the 31st—

Mr. Weadock: Wait a minute, what is this Mr. Clark?

Mr. Clark: I want to see if he recollects.

379 Mr. Weadock: Well, but what paper is it? What paper are you showing,—some of your figures?

Mr. Clark: Some of my figures, yes. I am just showing you that Mr. Maltby to have you read those names and see if the reading of those names brings to your mind the fact that you had some eighteen thousand dollars in notes outside of your business, besides the banking business, including the indebtedness to Stegeman Brothers?

A. The indebtedness to Stegeman Brothers was for some land we bought of them and there were some parties objected to it, and those notes were all taken up, the other notes here are the Maltby note, I think was for the children; some of them had left their money in there and we gave them notes for the amount. Ames and Bump, I think, was for insurance. Brotherton & Company was for supplies.

There were some outstanding debts outside of the bank; I don't remember how much; I don't suppose it amounted to a very great deal though outside of the bank;—very little; I did not find, in some cases, that even where there was cedar growing on the land, that on account of its location and situation or local conditions that it would cost me more to lumber it than it was worth,—I never found that to my remembrance.

Q. Now, taking up your banking methods with the Old Second National Bank, during 1902 and previously, what you did was to take an invoice, so-called, which purported to be a statement of your account with, we will say for illustration, the Michigan Central Railroad, showing that the Michigan Central Railroad Company owed you so much, and you would attach to that what purported to be an inspection ticket of the material, and what purported to be a bill of lading showing what had been shipped to the Michigan Central, and to that also you would pin a draft on the Michigan Central for the amount, and you would take it down to the bank and get the money on it, would you not?

A. Yes, sir.

That draft was never sent forward to the Michigan Central for acceptance; I don't think anything was sent to the Michigan Central to notify them that a draft had been discounted, that it was there; that was in the form of a business draft representing an actual sale to the Michigan Central and an actual indebtedness from them to me,—I am not referring to the transaction itself, but to the form of it; it looked like a business draft. (I would not answer, that.)

380 Q. Now, as a matter of fact you did discount a great many drafts in this form, which were not business drafts and did not represent any indebtedness at all?

A. I would not answer that.

Q. Do you refuse to answer it?

A. Yes, sir, without going into a long explanation of it.

Q. I show you a credit schedule, which is a copy, purports to be a copy of accountant's schedule offered in evidence on the trial before, Exhibit 158, purports to be a history of the Michigan Central

draft which was finally charged off to Profit and Loss.—I want you to follow me. Take the draft on March the 19th, 1902, for six thousand three hundred and thirty-one dollars and fifty-nine cents, discounted March the 19th, 1902, due June the 23rd; another draft of precisely the same amount was then discounted on June the 23rd, 1902, due June the 24th; another one of the same amount was discounted June the 24th, and due September the 26th; another one of the same amount discounted September the 26th and due December the 29th; a payment on that was made on December the 21st of three thousand two hundred and fifty-seven dollars and three cents, leaving a balance due of three thousand and seventy-four dollars and fifty-six cents, which was carried on by successive discount until there was a payment made of one hundred and thirty-one dollars and forty-one cents on May the 5th, and the balance was then finally carried into some demand notes and the demand notes were included, were incorporated in the Maltby Lumber Company notes and from drafts, the amount was finally charged to profit and loss; now, you don't mean to say that was a business draft.

Mr. Weadock: Now, I am objecting to that; I understand about objections being made in court. In fairness to counsel on the other side, I want to say that I object now and will object then, to anything in relation to what is merely the bookkeeping of the bank or the history of these papers in connection with the testimony of this witness, or any evidence at all, for the reason that my defendants have nothing to do with it.

Mr. Clark: The question that I have from you, Mr. Maltby, I am using this to serve to identify that particular paper, and you know that was not the only paper, that there were many other papers that were carried along for a year or more, some of them almost two years, being discounted and rediscounted for the same amount over and over again, that is true was it not?

381 Mr. Weadock: Do you propose to show either now or at any other time, that either of the defendants knew of this matter, these particular matters? That was entirely within the bank.

Mr. Clark: Yes, we propose to show that the defendant had knowledge. We showed it on the other trial. Now, answer the question, Mr. Maltby?

A. I don't remember about that particular draft; I think at the time the draft was given it was given for the regular commercial draft; it was renewed from time to time. I don't know that about November the 1st, 1902, there were outstanding drafts on the Michigan Central Railroad for over seventy-nine thousand dollars, and the Michigan Central owed me only about one-half of that amount; there might have been an excess over and above what they owed; that was because there might have been other materials to go to them; we had other large contracts with them for other material; I wouldn't swear that that was the only reason for that discrepancy.

Q. Don't you know that you discounted approximately that amount, at least, we will say, to make it perfectly safe, upwards of

fifty thousand dollars in drafts on the Michigan Central, which did not represent anything at all?

A. Is that a part of the——

Q. Answer *by* question?

A. There was,—I will say there was timber to represent every draft that was made; we had the timber on hand.

We had the stock on hand to represent everything that was made.

Q. Well, then you made, sometimes you drew drafts over and over again for the same timber then did you?

Mr. Weadock: Mr. Clark, let me say to Mr. Maltby, that he must decide for himself with reference to some of these questions as to whether or not he will answer them. I will not tell him not to answer questions, but he must decide that for himself.

A. (Witness:) Well, then I will say that I will not answer it.

Mr. Clark: You will not answer it. If there were on November the 1st, 1902, drafts outstanding of four hundred and two thousand dollars, representing an actual indebtedness of only about thirty thousand dollars, how do you explain that?

A. I don't think that is the case.

382 I wouldn't care to answer as to whether there was a very large discrepancy; when these drafts matured, I usually paid them with my own checks, sometimes they were checks of the companies; when we renewed the draft we used the same bill of lading.

Q. Well, were not there times when you purported to pay a draft and take it away with you, the paid draft with the bill of lading, and take it up to your office and pin the bill of lading on another draft and take it down again and discount it again as a new transaction?

Mr. Weadock: You do as you please about answering that Mr. Maltby.

A. I wouldn't answer it then.

Mr. Clark: If you did that a mere comparison of the car number and the date would have shown to the bank that it was the same bill of lading would it not?

A. That I don't answer.

I think some of these different kinds of inspection certificates pinned on these drafts were my own inspection certificates; my own inspection certificates usually went as a sale; usually went with the company, or our inspection generally held out with that company; I don't know what were the different coloring of the inspection certificates,—I don't know which were the pink and which were the yellow.

Q. Is it not a fact that you obtained money two or three times over on the same property by first using your own inspection certificate, and then the certificate of some subordinate railroad inspector and then the certificate of the chief railroad inspector, representing three different transactions, while, in fact, they were all the same property?

Mr. Weadock: You needn't answer that.

Mr. Clark: You don't answer that. You had a yard at Pinconning, you say, and one at River Rouge?

A. Yes, sir.

The Western Union had a yard there; neither the Western Union or the American Tel. & Tel. Company have a yard at Pinconning.

Q. You shipped property to yourself, consigning it to the American Telephone and Telegraph Company, care of Maltby Lumber Company?

Mr. Weadock: Now, Mr. Clark, you are aware that this is not a proper cross examination of Mr. Maltby.

383 Mr. Clark: But I am not aware that it is not a proper cross-examination.

Mr. Weadock: Well, you should be; therefore you ought not to proceed on this line of examination, and in the next place, after the warnings I have given, I will instruct Mr. Maltby not to answer.

Mr. Clark: He may be willing to answer some of them. I am trying to find out if he is.

Mr. Weadock: I know; never was competent as against the defendants. (Question read.)

Mr. Clark: Or care of Maltby yards. Did you do that sometimes?

A. I wouldn't care to go into that.

Q. Well, is it not a fact that you did that, and would use that bill of lading as collateral, and then you would re-ship the property out of your yard again and use another bill of lading for the same property?

A. I wouldn't answer that.

Q. You wouldn't answer that. What is your objection to answering these questions, Mr. Maltby?

Mr. Weadock: You need not tell him that.

A. (Witness:) I wouldn't care to state them.

Mr. Clark: Is there any particular connection between your banking methods during 1902, whatever they were, and the fact that you say you made a profit of ninety-seven thousand dollars that year?

Mr. Weadock: He has already explained that.

Mr. Clark: Have you any further explanation to make of that?

A. No, sir.

I think the bank directors could have treated me better; they tied my hands too much; no business of that magnitude could have been closed up in the time they insisted it be closed up without being disastrous to the business; and that I think was the result of trying to liquidate a business too fast; I haven't anything to say as to whether they said disagreeable things to me in connection with the interview we had; I wouldn't say they were disagreeable to me; they treated me very nicely; I wouldn't answer as to whether they showed any suspicion; ask them whether they believed what I said, I

384 wouldn't answer that. I decline to answer as to whether, if they did show any suspicion, I think it was undeserved; I

will leave that out too, whether I have ever done anything to merit suspicion; when I bought lands or timber, I did not always get an abstract and examine the title, have them examined by lawyers; sometimes our own men made the examination of them; and sometimes we bought without an abstract.

Redirect examination.

By Mr. Weadock:

I don't remember what expert accountants framed up this system of book-keeping for us, of which the land book was a part; it is some loose-leaf-ledger people; we charged over to a loose-leaf-ledger system; it came, I think, from Chicago; it was partly a scheme to sell their books to us,—some system we thought would simplify it; in the formation of this company, which I said I contemplated, I contemplated selling the stock just to parties doing business with myself; I did not propose to put any stock on the market at all; but that my son, my wife and myself would form the company, and there was some talk of some of the clerks in the office taking some of the stock; when I say that my credit was not good, I mean by that, that soon after the Mosier failure our credit was not good, but in the later years, our credit was good; but I did not go into business for some time after the Mosier failure; I mean, that when I commenced doing business I didn't have credit on account of the Mosier failure, but it did not handicap me in doing business after the first year,—after the first year, we had credit; we met our obligations; and, of course, the land we bought was itself a security if we didn't pay for it down; the supplies we bought, we bought mostly from Brotherton & Company; we had no difficulty in obtaining supplies.

Q. And so far as the selling was concerned, of course, that made no difference, because the people only paid for the material that they bought?

A. We had an excellent reputation in all of our dealings with the ones we sold to, and our camp orders that we issued at all the camps were taken just the same as a check.

I think the amount which the Second National Bank lost on the Mosier failure was a matter of public notoriety in the papers in Bay City and throughout the state; I don't think there was a failure before or since that attracted the attention and notice and comment that the Mosier failure did. Their rating, up to the time of the failure, was a million and over, and they had the highest credit rating. Theodore Hine had a little mill over at Bay City; and the notes with him grew out of some transaction with him; and the Mosier loss was on account of my having endorsed the Mosier paper;

I do not think the compromise I made with Mr. Bump about
385 my liability was in writing; I represented myself in it; I didn't have any attorney; that was made with Mr. Bump direct,—an agreement between Mr. Bump and myself; and from first to last, my business with him was done with Mr. Bump, except when he was away from the bank and Mr. Andrews did a little; as to the first time we were rated, or that the Maltby Lumber Company

was rated, I don't know that the Maltby Lumber Company was rated at all; I won't be sure. I think, before the Mosier failure A. Maltby was rated at ten or fifteen thousand dollars. I think we had a credit rating, but I don't think we had any capital rating; referring to the value of the lands we had been cutting timber off of some of these lands after we acquired them by purchase; we took into consideration the timber that had been cut from the land in making our valuation; the lands which had the timber on we valued them with the timber; at the time the inventory was taken, we took the value of those lands as they stood, timber or no timber. Speaking of these personal accounts, when we would advance a personal account say to John Smith, when we got out some cedar, that stood first as an account from John Smith to us, until we got the cedar, and when we got out the cedar we had a right to the personal property; and that was the meaning of a great many of the different advances; it was necessary to buy the timber for them and make advances for them to get it out in order to get the required amount of stock to fill our contract; and there was a loss on very few of those personal accounts that I know of myself; I think there was one loss at Pinconning, a man buying ties and reporting more ties than he had and made a loss of some few hundred dollars, I think; if we have a lumber camp for the purpose of getting out cedar, that has a value, and it has a value after the cedar is all gotten out; camp equipage means blankets, horses, sleighs, all kinds of camp tools, bedding, dishes; when we are through in one place that can be moved to another; we had a use for it right along all the time; I don't know anything about that letter of Mr. Bump, written in 1902, to which Mr. Clark has referred.

Q. Have you got the letter?

A. It was not written to me, was it?

Q. I don't know. It was a letter of Bump's.

A. I think possibly it was written to somebody else.

Mr. Clark: No, I didn't put it in evidence. I only used it for the purpose of the question.

Mr. Weadock: This competition, state whether or not you had been getting up a trust in the cedar business at that time?

A. No, sir, I wasn't getting up a trust.

386 Q. State what your plans contemplated beyond a successful carrying on of your business, if anything?

A. Nothing at all.

Q. Now, you were asked some questions as to what was understood by the bank. Do you know anything about what was understood by the bank?

A. In what respect?

Q. In reference to anything the bank understood, anything about this or that or the other thing. Do you know anything about that?

A. No, sir; I don't know anything about that.

They did not take me into their confidence and tell me what they understood about this or that; this inventory was not prepared specially for the purpose of incorporation.

Q. Well, was it padded or changed or fixed up in any way at all?

A. Not especially prepared for incorporation, oh, no sir.

Q. Well, was it padded—

Mr. Clark: Let him answer the question.

Witness:

A. There was merely put in there what we considered the value of the lands,—we increased the value of the lands what we thought they were well worth at that time.

I don't know anything about some eighteen thousand dollars' worth of notes outstanding to persons other than the bank, excepting the one to those brothers for ten thousand dollars; that was for the purchase of some timber, and the notes were afterwards given back to us; that was the Stegeman brothers; there was some fraud in the matter on their part; they bribed the man we sent there to look over the lands to make a false report; we had some litigation about it afterwards and they gave up the notes; I don't think they sued on the notes; we sued them and I don't think it ever come to trial, they settled; the suit was commenced in Bay City; one of the Stegemans lived near Onaway, and I think one of them lived out near Lansing; aside from that amount, I don't remember that we owed anyone else; very little we owed outside of the bank.

Recross-examination.

By Mr. Clark:

This amount invested in the yard and camp equipment,—tools—some of them might wear out, but the other supplies would not be much depreciated; horses, they wear out in time, but were good a good many years; we charged off for depreciation; what we charged off would show on the books; the sixty-four thousand dollars in real estate that we increased in 1902, I think the inventory showed
387 that we marked it up; I don't remember any comment being made in regard to it at the directors' meeting; I don't think there was anything said about the inventory; I don't remember now, but I do not think anything was said about any distrust about the inventory; they might have said something, I don't remember now,—nothing very remarkable about it that I should remember it; I don't know what they thought; I don't know that they ever expressed any thought in regard to it; they asked,—they proceeded—they asked me to give them a deed of trust on all the property, with the understanding that I was to have the management of it until it was paid out, which they didn't do; it is for them to decide whether, if that statement had been accurate in every respect that would have been a very foolish thing to do, to close out my business.

Redirect examination.

By Mr. Weadock:

So far as I am concerned, that is the way it worked out; if they had carried out the arrangement they made with me and continued to keep it going on as a going concern, in my judgment, it would

have paid all I owed and left me a good fortune besides; I believe it would have left me more than the inventory called for,—one hundred and eighty-three thousand dollars.

Recross-examination.

By Mr. Clark:

I don't know of any reason why they didn't do that, unless they thought they could manage it better themselves.

Redirect examination.

By Mr. Weadock:

Mr. Lewis had no knowledge at all of the cedar business; he was a bookkeeper for me when I was in the wholesale grocery business; and so far as I know, Mr. Carswell, had no experience at all with shingles, railroad ties, or any of the things we dealt in; as to him being put in to manage it, I don't know what they did after that.

Recross-examination.

By Mr. Clark:

I worked under their direction during the entire year of 1903, I had to submit things to them; I was, to a certain extent, the head of the business; I don't know what the public knew in regard to me being still the owner of the business; I don't know that the relationship of Mr. Lewis and the bank was made public; I don't know to what extent it was made public; I didn't make it public; I don't know whether the public supposed Mr. Lewis to be an employee of mine or not; so far as I know, they did; I had a certain amount of advisory power during all of the year of 1903; but my judgment was controlled by others,—they were the final decree.

Q. Referring to the sale of the assets, was there anything in which your judgment was improperly controlled that you could speak of?

A. Some lands, I think, were sold for less than their value; I don't remember now, as to the identity of that land,—I don't know: I think that all of our cedar, I had contracts for that, and the poles; that is, not all of it,—some of it,—but on account of not being able to get other poles to go with it we were not able to fill the contracts; some of the contracts had to be cancelled; had one contract with the Pere Marquette road for a half a million ties, that was worth, I should say, forty or fifty thousand dollars if we had been ready to have gone on through with it. Another contract of fifty thousand dollars with the Chicago Northwestern, and several other contracts; of course to go on and fill them, would necessitate the keeping on of the business, buying more material and buying more lands.

Redirect examination.

By Mr. Weadock:

Instead of keeping this as a going concern and working out all of my contracts, they simply sacrificed it and got what they could out

of it, lands and all; we had standing timber which we could have cut and put into these contracts and they would have brought us a good big profit; they could have carried out the business and managed it as a going concern just the same as it was done the previous years; I had made money out of it, and there was no reason why I shouldn't. I was in better shape to make money then, because we had all of the business going our way and all of our contracts were excellent contracts, and at big prices, and good people; all of these people mentioned were A No. 1 pay.

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DEFENDANT'S EXHIBIT 122.

Called the "General Collateral Agreement."

In consideration of loans already made, and loans to be made, by the Old Second National Bank of Bay City, to the Maltby Lumber Company of Bay City, and of the renewals of paper made by the said Company to said Bank, the said Maltby Lumber Company hereby agrees to and with said Old Second National Bank of Bay City that any and all bills of lading, shipping bills and any and all other papers, documents or other collateral security held by the said Bank as collateral to any loan made by it to said Maltby Lumber Company may and shall be held as collateral security to every other such loan by said Bank to said company; the intention being that all collateral now or which shall hereafter be held or on deposit in the said Old Second National Bank, on account of any loan by it to said Maltby Lumber Company shall be and hereby is made collateral to all indebtedness of said Maltby Lumber Company, now existing or which shall hereafter exist to said Bank until said indebtedness is completely extinguished.

Dated at Bay City this 5th day of January, 1903.

(Signed)

MALTBY LUMBER CO.

DEFENDANT'S EXHIBIT 123.

Bill of Sale.

Alzina Maltby
to
Alvin Maltby.

Know all men by these presents that I Alzina Maltby of Bay City in the County of Bay, State of Michigan, for and in consideration of the sum of One dollar and other valuable consideration, to me in hand paid and rendered by Alvin Maltby, of said Bay City, the receipt whereof is hereby acknowledged, have bargained and sold and do hereby assign and convey unto the said Alvin Maltby his executors, administrators or assigns the following described property that is to say: All my real estate and all the interests and equities

to which I am entitled in and to any real estate wheresoever the same may be situated; and also all the telegraph and telephone poles, railroad cross ties, posts, shingles, logs, lumber, timber and forest products belonging to me, being and including all of the stock in trade and property of the Maltby Lumber Company, under which name I have been and am doing business, I being the sole owner of the property of the said Maltby Lumber Company, and also all of my personal property wheresoever situated including all accounts, bills payable and causes of action owing or payable to me personally or to said Maltby Lumber Company (except my homestead in Bay City, and my household and personal effects, horse, carriage, harness, etc., all of which are expressly reserved from this Bill of Sale).

390 And I do hereby also sell and grant unto said Alvin Maltby the good will of the business of the Maltby Lumber Company, and grant unto him the sole and exclusive right to the use of the business name of the "Maltby Lumber Company."

And I do hereby also agree to execute in due form and deliver such other real estate conveyances as may be required to give full force and effect to this Bill of Sale.

It being expressly understood and agreed by the parties hereto that the said Alvin Maltby as a part of the consideration of this Bill of Sale hereby assumes and agrees to pay all of the indebtedness of the Maltby Lumber Company.

Witness my hand and seal this twenty-ninth day of June, 1903.
ALZINA MALTBY. [SEAL.]

In presence of
IRVING A. MALTBY.
C. L. COLLINS.

On this twenty-ninth day of June, 1903, before me personally appeared Alzina Maltby to me known to be the person described in and who executed the same as her free act and deed.

CHESTER L. COLLINS,
Notary Public, Bay City, Mich.

SCHEDULE "A."

Collateral Security for the Payment of Notes Given by A. Maltby to the Old Second National Bank of Bay City, Michigan, Schedule "A."

1. General Collateral Agreement.
2. Eighteen deeds running to James Davidson for real estate and timber located in the following named counties in Michigan, viz:—Alcona, Arenac, Charlevoix, Cheboygan, Crawford, Emmet, Genesee, Iosco, Missaukee, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon and Wexford.
3. Paper showing these deeds to be in the nature of a mortgage.
4. Bill of Sale from Alzina Maltby to A. Maltby.
5. Chattel mortgage from A. Maltby to the Old Second National Bank of Bay City, Michigan.

DEFENDANT'S EXHIBIT 124.

Chattel Mortgage.

Alvin Maltby
to
Old Second National Bank, Bay City.

Whereas Alzina Maltby, of Bay City, Michigan, has been doing business under the name of the Maltby Lumber Company, being the sole owner of the property of that Company whose principal office has been and is Bay City:

And whereas, said Alzina Maltby doing business as afore-
391 said is indebted to the Old Second National Bank of Bay City, Michigan, in the sum of two hundred and seventy thousand eight hundred and ninety-eight dollars and sixty-seven cents.

And whereas said Alzina Maltby has by bill of sale duly executed, assigned and conveyed all of her property of her other property except (homestead and other items expressly excepted in said Bill of Sale) to Alvin Maltby of Bay City, Michigan, by and in which bill of sale said Alvin Maltby expressly assumes and agrees to pay said indebtedness of said Maltby Lumber Company to said Old Second National Bank of Bay City.

Now, therefore, this mortgage made by the said Alvin Maltby, party of the first part, unto the said Old Second National Bank of Bay City, party of the second part, witnesseth that the said party of the first part, for the purpose of securing said indebtedness and interest thereof has granted, bargained, sold and mortgaged, and by these presents does grant, bargain, convey and mortgage unto the said Old Second National Bank of Bay City, the following personal property that is to say: All of the telegraph and telephone poles, railroad ties, posts, shingles, lumber, timber and logs and forest products belonging to said Maltby Lumber Company, and belonging to first party, being all of the stock in trade in the business of the Maltby Lumber Company and all of the personal property wheresoever situated belonging to said Maltby Lumber Company and also all other personal property (except exemptions * * * allowed by law) belonging to first party; and also all of the logs, lumber, round timber, shingles, posts, poles and other forest products which are acquired by party of the first part by purchase and manufacture and which become a part of the stock in trade or property used in connection with the business of said party, or the business of said Maltby Lumber Company, and also all of the accounts and bills receivable and causes of action belonging to first party or owing to said Maltby Lumber Company or to first party. It being the intention of this mortgage to include in the mortgage all property of every name and nature wheresoever situated transferred by said Alzina Maltby to said Alvin Maltby.

* * * * *

And it is further agreed that the amount above stated represents direct indebtedness to second party and that all other indebtedness owing by first party to second party as endorser and otherwise shall be secured by this mortgage and that the party of the second part may have permission to sell in and according to the usual course of business the poles, ties, posts, shingles, logs, lumber and other forest products hereby mortgaged.

It is agreed by party of the first part that the proceeds of such sales as shall be made of said property shall be payable and paid to, or collected by second party hereto and that he will give the business of the Maltby Lumber Company his entire time, and will devote his best energies thereto, and that he will not withdraw from the money of said company on her personal account to exceed \$3,000.00 per year from July 1st, 1903.

* * * * *

In witness whereof the said party of the first part has hereinto subscribed his name this twenty-ninth day of June, 1903.

ALVIN MALTBY.

In presence of

IRVING A. MALTBY.
C. L. COLLINS.

Twenty-three deeds were introduced in evidence by the defendants, and marked Exhibits 125 to 147, inclusive. Seventeen of these deeds were dated in May, 1903, two on Nov. 28, 1903, one in July 14, 1904, two June 1, 1908, and one Sept. 21, 1907.

The deeds dated in May, 1903, were recorded at different dates in May and June, 1903. The deeds were absolute in form, the grantee named therein being James Davidson (being the same James Davidson who was president of the bank). These deeds purported to convey substantially all the real estate and timber described in the Maltby Inventory of Oct. 31, 1902, and the Maltby Land Book.

EXHIBIT 252.

American Telephone & Telegraph Company,
Purchasing Department.

R. A. Griffin, Purchasing Agent, 15 Dey Street, New York.

Order No. 27646.

Dec. 30th, 1901.

Maltby Lumber Company, Bay City, Michigan:

Please furnish this company with the following material, and send bill for same upon date shipment is made.

		At Pinconning, Mich.	At River Rouge, Mich.
10,000	Standard 25 ft. cedar poles,	\$1.65 ea.,	\$2.00 ea.
7,000	" 30 ft. cedar poles,	3.15 "	3.65 "
2,000	" 35 ft. cedar poles,	4.35 "	5.15 "
1,500	" 40 ft. cedar poles,	5.50 "	6.50 "
393			
700	" 45 ft. cedar poles,	8.00 "	9.00 "
300	" 50 ft. cedar poles,	11.00 "	12.50 "
50	" 55 ft. cedar poles,	15.00 "	16.50 "
15	" 60 ft. cedar poles,	19.00 "	22.00 "

Otherwise as per contract of December 12th, 1901.

Ship by:

Ship to American Telephone & Telegraph Co.

As directed by the Supply Agent.

If you are unable to fill this order, notify me at once.

Yours truly,

(Signed)

R. A. GRIFFIN,

Purchasing Agent.

Req.

12/27/01.

Subject.—Enclosing copy of contract.

FREDERICK P. FISH, *President.*

EDWARD J. HALL,

Vice Pres. & General Manager.

CHARLES E. HUBBARD, *Secretary.*

WM. R. DRIVER, *Treasurer.*

American Telephone and Telegraph Company,
Russell A. Griffin, Purchasing Agent, 15 Dey Street.

NEW YORK, December 20th, 1901.

Maltby Lumber Company, A. Maltby, Esq., President, Bay City,
Michigan.

DEAR SIR: I send you herewith, for your files, a copy of our pole
contract, duly executed on the part of this company.

Yours truly,

(Signed)

R. A. GRIFFIN,

Purchasing Agent.

(Enclosure:) This Agreement, made and executed this 12th day
of December, 1901, by and between the Maltby Lumber Company,
a corporation, duly organized and existing under and by virtue of
the laws of the State of Michigan, hereafter referred to as the Con-
tractors, party of the first part, and the American Telephone and
Telegraph Company, a corporation duly organized and existing

under and by virtue of the laws of the State of New York, hereafter referred to as the Telephone Company, party of the second part.

Witnesseth: That for and in consideration of the covenants herein contained, the parties hereto mutually covenant and agree as follows:

First. That the contractors shall furnish and deliver to the Telephone Company, as hereinafter specified, 21,565 white cedar poles, which shall conform in all respects with the requirements of the following specifications, which shall be rigidly enforced:

Specification.

The standard pole shall be of the best quality live green cedar wood, squared at both ends, reasonably straight, well proportioned from butt to top, peeled, knots trimmed close, and of the following dimensions:

Length in feet.	Circumference at top in inches.	Circumference 6 ft. from butt in inches.
25	20	30
30	22	36
35	22	38
40	22	43
45	22	47
50	22	50
55	22	53
60	22	56

All poles shall be subject to inspection by this company at the point of shipment. Any pole failing to meet all the requirements of this specification will be rejected.

Second. That such poles shall be in the quantities and of the lengths respectively stated below:

10,000—25's
 7,000—30's
 2,000—35's
 1,500—40's
 700—45's
 300—50's
 50—55's
 15—60's

The Telephone Company agrees to pay for such poles as hereinafter provided, at the following rates, F. O. B. cars:

At Pinconning, Mich.

25 ft. at \$1.65 each,
30 ft. at 3.15 "
35 ft. at 4.35 "
40 ft. at 5.50 "
45 ft. at 8.00 "
50 ft. at 11.00 "
55 ft. at 15.00 "
60 ft. at 19.00 "

At River Rouge, Mich.

25 ft. at \$2.00 ea.,
30 ft. at 3.65 "
35 ft. at 5.15 "
40 ft. at 6.50 "
45 ft. at 9.00 "
50 ft. at 12.50 "
55 ft. at 16.50 "
60 ft. at 22.00 "

It is further provided, however, that the Contractors shall ship all poles duly accepted by the Telephone Company, when and as requested by the Telephone Company to any points to be hereafter designated by the Telephone Company, and shall prepay all freight charges on such shipments to such points.

395 Third. The Telephone Company shall pay to the Contractors the amount of all freight charges within ten days, of the receipt by the Telephone Company of receipted freight bills for such charges. It is provided, however, that the contractors shall reimburse the Telephone Company to the full amount of all rebates that they may be able to obtain on account of freight.

Fourth. That the Contractors shall collect and store at points above mentioned, poles as within specified, which shall be inspected by the duly authorized inspectors of the Telephone Company, as they are received at the above mentioned points, and shall be held there subject to the directions of the Telephone Company until the first day of November, 1902.

Fifth. That the Contractors shall, on or before the first day of June, 1902, have delivered, or have stored at the yards above mentioned, ready for delivery, poles to one-half of the number called for by this contract, and shall on or before the first day of September, 1902, have delivered or have stored ready for delivery, poles to the whole number called for by this contract. It is further provided, that in case the Contractors shall not have delivered or have stored at the yards as stated above, ready for delivery, the full number of accepted poles within the time specified, the Telephone Company may make good such deficiency by purchase in the open market, and the Contractors shall reimburse the Telephone Company for all cost or expense that it may suffer thereby.

Sixth. That the Telephone Company shall furnish such inspectors, not exceeding three, as shall enable said Contractors properly to furnish the poles specified.

Seventh. That the Telephone Company shall, commencing on the first day of March, 1902, pay to the Contractors fifty per cent. (50%) of the yard price of all poles accepted by the Telephone Company prior to that date, which are being held by the Contractors subject to the directions of the Telephone Company, or have been shipped by the Contractors on account of and as requested by the Telephone Company; and shall on the first day of each and every month thereafter, pay at the same rate for such additional poles as may have been accepted and stored, or shipped as before provided during the pre-

ceding month, the balance to be paid by the Telephone Company when the poles have been shipped by the Contractors to points directed by the Telephone Company. It is further provided that the Telephone Company shall pay the Contractors in full for all poles not shipped on the first day of November, 1902.

396 Eighth. That the contractors shall store in their regular yards, either at Pinconning or River Rouge, Michigan, all such poles not shipped before November 1st, 1902, for a period of six months from said date (unless the Telephone Company shall, during that period order said poles, or any of them to be shipped, in which case they shall be shipped by the Contractors as hereinbefore provided) and the Contractors shall pay all insurance, taxes and other charges on said poles during said period (or until shipped as above mentioned) for which the Telephone Company shall pay to the Contractors 3% of the contract price herein named on all such poles less than 50 ft. in length, and 25 cents for each such pole 50 ft. or more in length.

That the Telephone Company may, if it so elects, continue the storage of such poles, or any of them, upon the above mentioned terms at the same rate, for a further period of six months from May 1st, 1903.

That in the event of the destruction or loss of any said poles from any cause whatsoever, while being stored by the Contractors as above provided, the Contractors shall, as soon as possible, furnish to the Telephone Company an equal number of poles of the same kind, quality and length, and in all respects complying with the standard specification of the Telephone Company, or at their option, the equivalent in money at contract prices.

In Witness Whereof, as of the day and year first above mentioned, the parties hereto have executed this instrument in duplicate, by their respective officers, thereunto duly authorized.

(Signed)

MALTBY LUMBER COMPANY,

Per A. MALTBY, *Manager.*

(Signed)

AMERICAN TELEPHONE & TELEGRAPH CO.

EDW'D J. HALL,

Vice-Pres. & Gen'l Manager.

Attest:—

ALFRED E. HOLCOMB,

Assistant Secretary.

EDGAR B. FOSS, after being duly sworn on behalf of the defendants, testified as follows:

Examined by Mr. T. A. E. Weadoek:

I reside at Bay City, and am engaged in the lumber business. I have lived there in the vicinity, probably, of 40 years. I have been engaged in the lumber business for myself for thirty-five years. I don't recollect how long I have been a director of the Second National Bank; I should say 15 or 20 years. I knew the directors of that bank in 1902 and 1903. I knew all of them.

I knew Mr. Orrin Bump for about twenty years. He was considered a first-class banker, and ranked among the best in Bay City. No question as to his ability or as to his integrity. My business was carried on at Bay City all this time, and I lived in Bay City. At the present time I live on the corner of Center and Johnson Streets. Before moving here, I lived near by Mr. Bump. I have known Mr. Frank T. Woodworth for a good many years; twenty-five years probably. I have known him as I have known other business men in town here. I have known him quite well. I think I occasionally bought lumber of him when he was in the saw mill business.

Q. Did you at any time during the year 1903 have anything to do with the publication of a report in the newspaper of the condition of the Second National Bank?

A. I cannot say, unless I see the statement. I had nothing to do with the publication of the notice in the paper. I signed that report of the Old Second National Bank of the 9th of June, 1903, Exhibit 240.

Q. I asked you whether, before you signed it, it had been signed by the cashier of the bank, Mr. M. M. Andrews?

A. I presume it had.

Q. And whether it had been sworn to by you prior to certifying it?

A. That is my recollection of it. I cannot say as to whether I signed the statement at the same time James Davidson did, or at a different time. The cashier placed the statements before me and asked me to sign them, stating they were correct. I signed the report of the 9th of April, 1903. Exhibit 222. I signed that in the same way as the previous one to which you have called my attention. The report of the Old Second National Bank for the 17th of November, 1903, Exhibit 242, I signed. The circumstances under which I signed this report would be the same as to the one you previously asked me about. Of the five reports called for in 1903, I signed three of them.

Q. Before signing these reports, Mr. Foss, had you made any particular examination of the bank, to determine whether or not the bills, loans, discounts, and other items mentioned in the report were correct by an actual investigation of the affairs of the bank?

Mr. Clark: We object to that as leading, and apparently designed to show what the witness did not do, which is immaterial. He can state what he did, and we will have no objection.

398 The Court: I will sustain the objection.

Mr. T. A. E. Weadock: Note an exception.

Q. What did you do, Mr. Foss, with reference to verifying this report by an actual examination of the affairs of the bank as of that date?

A. I made no actual examination at that time. I may have been on an examining committee.

Q. State what examination, if any, of the affairs of the bank, of Loans and Discounts and cash on hand, or amounts due to the bank and from the bank, you made before signing these three reports of 1903 which bear your signature?

A. I made none. I should say I have known Mr. Andrews forty years. I have known him quite intimately. I consider him a good banker and thoroughly honest.

Q. State whether or not the employees of the bank, the bookkeepers, tellers and other employes of the bank, so far as you know, in the years 1902 and 1903, were honest and competent?

Mr. Clark: The same objection, as immaterial. We do not question the fact; we are not attacking them in any way, and this is immaterial in this case.

The Court: The objection is overruled, if you want to spend any time on it.

Question read.

Objection renewed.

The Court: I will exclude that. The matter has been gone over time and again.

Mr. T. A. E. Weadock: Note an exception.

Q. Why did you sign these reports, Mr. Foss?

Mr. Clark: We object to that as immaterial. Mr. Foss is not a party to the case, and his reasons are immaterial.

The Court: Excluded.

Mr. T. A. E. Weadock: Note an exception.

Q. At the time you signed those reports, Mr. Foss, did you believe the reports to be true?

Same objection, ruling and exception.

399 Q. At the time you signed those different reports, what was your judgment as to whether or not the reports were a correct transcript of the books of the bank?

Same objection, ruling and exception.

Q. You spoke about having at some time made an examination of the affairs of the bank. I show you Exhibit 243. Is that your signature to that paper?

A. Yes, sir, and I was one of the committee of the whole board that examined that bank in 1902,—May 29th. I signed that report which was made to the bank. I cannot remember that particular examination. I do not remember the particular examination at this time. I knew of the Maltby line of discounts.

Q. And what information did you have from Mr. Bump in 1902, say the 1st of May, 1902; what information did you have from him as to the status and condition of that line of discounts?

Mr. Clark: We object to that as hearsay. The defendants have already stated what Mr. Bump told them, and what he told some one else is incompetent and hearsay.

The Court: I will exclude that.

Mr. T. A. E. Weadock: Note an exception.

Q. At the time you signed those different reports to which I have called attention, namely, the reports to the comptroller, how did you regard the Maltby line of discounts?

Same objection, ruling and exception.

Q. Do you remember whether Mr. Chesbrough was present and signed a report that you, also, signed at the same time?

A. I recollect Mr. Chesbrough being present at some examination, but I don't know when.

Q. I am speaking now of the signing of the reports. You were here during all the time in 1902 and 1903?

A. I was in Bay City generally. I don't recollect as being absent.

Q. Did you know generally the business of the Maltby Lumber Company, what it was doing, in those years, 1902 and 1903?

Mr. Clark: That we will object to. Anything that asks what the witness knew at that time, is incompetent and immaterial.
400 The Court: It is preliminary. I will overrule the objection. I will permit him to show the value of those securities and all about them. I will admit this as preliminary.

A. I knew they were doing a large business, and it was a business in cedar ties, poles, and things of that sort. I was not interested in any way in that business, neither was I interested in any way with Alvin Maltby, or the Maltby Lumber Company, or the property of Alvin Maltby. I was not engaged in any way in that business. I was not interested with Mr. Alvin Maltby in any way; my business was entirely different.

Q. Do you remember when Mr. Maltby came before the directors of the bank in reference to his line of discounts, in the fall of 1902?

A. I don't recollect just when he did come before the board. I know he was before the board in reference to this matter. I remember an inventory, but the date is so long back I cannot place the time. While examining the bank, I—of course—examined the notes and the collaterals attached. I had nothing to do after the bank took possession of the Maltby property, as to the management of it, except as a member of the board of directors of the bank.

Q. Did you at any time from May, 1902, or from October 22nd, 1902 until Nov. 17, 1903, offer any resolution on the board of directors for the purpose of charging off any of the Maltby paper?

A. It is possible I did, I don't recollect. If I did so, I presume there was a record made of it.

Q. If there is no record, what would be your judgment as to whether or not you did offer such a resolution?

A. I think there should certainly be a record of it.

Q. What was the custom of the board with reference to entering matters on the records that were discussed by the board and no action taken?

A. I don't think the minutes will show anything of that sort.

Q. Have you any recollection, if the record, is silent on that subject, as to whether or not at any time prior to Nov. 17, 1903 you offered a resolution that any of the Maltby Lumber Company paper should be charged off?

A. I don't recollect.

Q. Do you recollect that any other member of the board of directors did or did not do that within that time?

A. I have no recollection with regard to it.

Q. Did you regard the Maltby paper during the time prior to 1903 as secure?

Objected to; sustained; exception for the defendants.

401 In a general way. I did know Mr. Maltby's business career in Bay City before that time. He was doing a large business. Regarding the interest he was paying the bank in the course of the year, in 1902, I have an indistinct recollection. He must have been paying around \$30,000.00.

Q. Did you have anything to do with the discounts in the first instance, of any of this paper, at any time before Nov. 17, 1903—of the Maltby Lumber Company—or was that business done by Mr. Bump?

A. The account was in the bank before I was director. Prior to the date you have called my attention to, I got my information with reference to the Maltby Lumber line, from Mr. Bump. Mr. Bump from time to time gave the board such information as it asked for.

Q. State whether or not the board of directors relied upon Mr. Bump's statement?

Objected to on the ground that the witness cannot say what somebody else relied upon. Sustained; exception for the defendants.

Q. State whether or not you relied upon the information given you by Mr. Bump with reference to the Maltby line?

Objected to as immaterial. Sustained; exception for the defendants.

Q. Did you know about the manner in which the accounts in behalf of the Maltby Lumber Company against the American Telephone & Telegraph Company or the Grand Rapids & Indiana Railway Company, and these other companies to whom he was furnishing forest products were assigned to the bank?

A. My recollection is there were drafts drawn on these different companies with bills, and certificates of inspection, made by the buyers attached to the drafts, and the drafts were held. I don't recollect whether there were other assignments than the drafts and inspection certificates. I recollect there was one rubber stamp which was used on the back of these invoices prepared by Mr. Collins.

Q. Do you recollect what Mr. Collins said as to conveying the title of the property that had been forwarded by these companies to the bank?

A. Yes, sir. The board was present; I don't know whether they were all there or not.

Q. That is, on shipments made by the different companies?

A. I understood it conveyed the title.

Q. State whether or not you heard the letters read, or read them yourself, that were dated 1898, 1899, 1900, 1901, 1902, and 1903 prior to the 17th of November, from the different companies to which the bank had sent letters in reference to this assignment, and its acceptance by the different companies?

A. I recollect reading the letters; I cannot tell what the contents were now, I might recognize the letters if I saw them again,—I don't know.

Q. Do you remember whether or not the substance of letters of the same tenor and effect was stated to you by Mr. Bump, or by any officer of the bank, as having been received by the bank?

A. I could not remember the result, but I got the substance from Mr. Bump or probably read the letters.

Q. I show you a number of letters all of which have been offered in evidence, and ask you to glance over them and state whether they were brought to your attention, and if so, which ones?

A. I recollect such general letters were written to all of the parties owing Maltby for ties and poles, and in most cases the acknowledgment came to the bank. Just such a letter as this from the Michigan Central.

Q. What can you say as to the others?

A. Well, the New York Central, I recollect that. They are all of the same general purport. I recollect having seen most of these letters, and the Maltby letters asking them to pay the proceeds to the Old Second National Bank, and their reply, saying they would. The bank acted on Collins' advice in reference to getting these securities. I knew of the deeds from Maltby to the bank, the general collateral agreement of about January 5, 1903, the agreement to give the deeds to the real estate at that time, and the taking possession of the personal property by the bank.

Q. State whether or not you then regarded the line of the Maltby Lumber Company in the Second National Bank as secured?

Objected to as immaterial.

The Court: Yes, what he thought at that time is not competent to this issue. It is excluded.

Exception for the defendants.

Q. Was that line secured, Mr. Foss. I am speaking now of 1902 and 1903?

A. It was secured by the assignment of these accounts and the certificates of inspection, and later on by the property, and the real estate, and the general collateral agreement, also the chattel mortgage and bill of sale.

Q. What was the judgment of the board at that time as to whether or not this account was secured?

403 Mr. Clark: That is objected to as immaterial so far as the witness is concerned, and so far as concerns other members of the board he cannot know.

Sustained; exception for the defendants.

— Any statements which Mr. Bump made to the board of directors from time —, I believe them to be accurate and truthful. I don't recollect that he was ever called upon to produce any papers that he did not produce.

Q. Did Mr. Lewis ever make any report to you of this business after the bank took hold of it, the Maltby business?

A. Not to me personally.

Dec. 17th, 1912.

JAMES M. LEWIS (recalled).

Examined by Mr. T. A. E. Weadock:

Since I was on the stand I have made a further search for the inventory of October 31, 1902, and found it; I found it in the vault of the Old Second National Bank. (Paper produced.) The paper you show me marked "Inventory, October 31, 1903,"—I found that since I was on the stand before; that is the inventory of the Maltby Lumber Company turned over to the bank as security, taken on or about the 31 of October, 1903, a copy of it; the inventory was taken by the employees of the Maltby Lumber Company under Mr. Maltby's supervision; I had nothing to do with it only to extend the different amounts from the slips that were turned in by the different men; at that time, Mr. Maltby was working for the Maltby Lumber Company. I have found in the files of the Maltby Lumber Company certain contracts which Mr. Maltby had with the Western Union Telegraph Co., Traverse City and Manistique Railway Co., the Toledo and Western Railway Co., International Construction Co., the American Tel. & Tel. Co. When the Maltby Cedar Company was organized, it took over the books and papers and office of the Maltby Lumber Company.

Examined by Mr. Clark:

I don't know anything about whether Mr. Maltby actually owned the property mentioned in the 1902 inventory; I do not say that he did; nor I couldn't say that he owned the property mentioned in the 1903 inventory.

404 Mr. Weadock: Now, I offer in evidence Exhibit 247, being the Maltby inventory of October 31, 1902.

Mr. Clark: As a part of the history in the case and the facts in the case, we have no objection. We wish the court to state to the jury at this time that the inventory does not prove its own accuracy, and if it is offered as being self proving, we object to it. As a part of the history of the case, we have no objection.

The Court: It is admitted. It is not in itself proof that—

Mr. T. A. E. Weadock: It is proof that it is an inventory. I do not want to be misunderstood about that. This inventory is offered in evidence as the inventory that was submitted by Mr. Maltby to the directors, and as showing what Mr. Maltby claimed, and what we claim, was the security given at that time or afterwards, and the property owned by him.

Mr. Clark: We have no objection to their being offered in evidence.

The Court: They are received.

Mr. John Weadock: This is the lost one.

Mr. T. A. E. Weadock: Note an exception to the statement. It was not lost. It was in the vault of the Old Second National Bank. There is a list of lands consisting of nine pages. The inventory specifies in which case they own the land and in which case they

own the timber only; and they are in the counties of Roscommon, Missaukee, Arenac, Otsego, Wexford, Crawford, Alcona, Ogenaw, Iosco, Charlevoix County, Emmett County, Wexford County and in the State of Wisconsin.

By Mr. T. A. E. Weadock:

Q. Did you make any personal examination of the property described in the inventory of October 31, 1902, which I have just read?

A. No, sir; I did not.

Q. Did you find that inventory incorrect in any particular as to the property on hand?

Mr. Clark: We object to that. The witness said he didn't investigate.

Mr. T. A. E. Weadock: I asked him if he examined the property. Now I ask him if he found the inventory incorrect.

405 Mr. Clark: We are willing to have him answer it if he knows.

Mr. T. A. E. Weadock: I don't want him to answer, if he doesn't know.

A. I never examined the inventory.

I was not in charge of the business in 1903; I went into the office in January, 1903; I handled the finances, opened the mail, put the moneys that came in the proper place; I didn't make any contracts; I didn't buy any timber to carry out contracts; I think Mr. Maltby did; I don't know under whose direction he bought timber, it was not under mine; Exhibit 248, which you show me, the trial balance and the recapitulations on the end are made out in my handwriting; that which I say I made out, I made from—after the inventory had been completed and turned into the office and handed to me; I could not answer as to what lands of the Maltby Cedar Co. had been sold between the early part of January, 1903, and the time this inventory was taken on the 31st of October, 1903; I could not answer as to how much money had been received for property sold during that year, while I was in charge of the finances; I don't remember a note of \$10,000 of the Maltby Cedar Co., that was part of the Maltby Lumber Company indebtedness; I know the bank had notes; I think there was such a note paid out of the proceeds of the business; the last payment was made on it within a month.

Q. Of the amount that has been collected by the Maltby Cedar Co., within comparatively a recent time from the proceeds of the Maltby security, what amount was carried, surplus?

Mr. Clark: You are asking him for the Maltby Cedar Co. books?

Mr. T. A. E. Weadock: No, I am asking him for the \$10,000 note.

The Maltby Lumber Company indebtedness was put into a note of the Maltby Cedar Company; and as money was collected, from time to time from the proceeds of the Maltby property it was applied upon that note; there was a note of \$10,000 made by the Maltby

Cedar Company for a part of the Maltby Lumber Company indebtedness; there was endorsements made on that note at different times, I don't recall the dates; it has all been paid, I won't say as to the interest; we didn't pay any interest on it; as to whether, in addition to that \$10,000, \$2,000 was carried in the Maltby Cedar Co. account, there was \$2,000 turned over to the bank since the payment of the note; that made \$12,000, in addition to that we have six or seven hundred dollars in the bank; and in addition to that we have about two land contracts; they are in Ogemaw County; the contracts
406 are in office; I did not bring them over, but will bring them over later; we have very few lands in Iosco County, about 320 acres; all the other lands have been sold; those lands have been sold under the direction of the board of directors of the Maltby Cedar Company; as to what person actually sold the lands and who has had charge of it, I think there was the president, secretary and one of the directors had charge of the selling of the lands; I cannot tell you who was president when they started in. (Witness refers to paper.) At the time the arrangement was started, Mr. Woodworth was president of the Maltby Cedar Company, and the selling of the lands was placed in the hands of the president, secretary and director James E. Davidson; I think director James E. Davidson, was president of the bank at that time, I am not sure; and the secretary was myself; we did not wait to sell these lands until somebody came along to buy them; we had an ad. in a paper in Ogemaw County, and one in Iosco County, that we had lands for sale in those counties, and there were people dealing in lands whom we let know we had lands for sale. There was some land sold to Mr. Ames; that is all we did that I know of; I don't recall how long we kept the ad. in the Ogemaw county paper; they were kept in both papers some little time; the inventory of the poles, etc., in this inventory of 1903 was taken by the foreman and the men at the different localities and different jobs that Mr. Maltby had; as to the honesty and competency of these men to take the inventory, I would say, that they were supposed to be competent cedar men, all of them; if I paid these men at that time, I paid them under the direction of Mr. Maltby; I didn't furnish any money to pay them; they were employes of the Maltby Lumber Company; they were paid by the Maltby Lumber Company out of the money they had on hand; Maltby himself was getting a salary at that time; and whatever Maltby got and whatever all of these employes got for their work came out of the business,—out of this property that was being sold; I don't know what became or what was done with the poles that were on hand at the Alpena yard, amounting to \$1,074.65 on October 31st, 1902; I suppose Mr. Maltby knows; I was not there in 1902; as to what was done with them after the time before the 31st of October, 1903, after I had been nearly a year as the financial man in the Maltby Lumber Company, I suppose they were sold in the regular course of business; that is all I know about it; as to whether Mr. Maltby went ahead and sold as he saw fit and bought as he saw fit, and just reported to me the finances, I only handled the financial end of it.

407 Q. Take the money when it came to you and turned it over to the bank?

The Court: This has been gone all over by this same witness, if I remember right.

Mr. Weadock: I don't think so.

Q. As the money came in I deposited it in the bank and it was checked out in the regular course of business; I do not know how much money I received and paid over to the bank prior to the first of January, 1904; I think the financial contracts of Mr. Maltby in reference to the sale and furnishing of poles and other forest products were filled by him.

Q. What was done, if anything, if you know, under the contract with the American Telephone and Telegraph Co., of December 30, 1901?

The Court: That paper has not been identified and you ought to have it marked.

Mr. John Weadock: I would like to ask counsel whether he proposes to offer the paper in evidence?

Mr. T. A. E. Weadock: I have not decided about that.

Mr. John Weadock: Then I submit it is improper to examine a witness in relation to the paper.

Mr. T. A. E. Weadock: If, from further examination, I find the paper is competent, I will offer it.

Mr. John Weadock: Then I submit it should be marked.

The Court: I have already said it should be marked, and if you ask any questions further with reference to that paper I want it marked.

Mr. T. A. E. Weadock: Note an exception and I withdraw the question.

Witness: I do not remember the contract that Mr. Maltby had with the Pere Marquette Railroad Company; I did not find any such contract; I received a subpoena duces tecum, with the direction in it to produce all these contracts, but I don't think the name of the Pere Marquette was in the subpoena; it named contracts between Mr. Maltby and the different railroad and telegraph and telephone companies, up to the year 1903; I did not find the Pere Marquette contract; I got all the contracts I could find.

408 Mr. T. A. E. Weadock: I offer in evidence Exhibit 248, being the inventory of October 31st, 1903.

Mr. Clark: If that is offered to—

Mr. T. A. E. Weadock: Now, I object to this way of making a speech before the jury under the guise of making an objection. If an objection is to be made let it be stated.

Mr. Clark: We object to the introduction in evidence of this inventory, as hearsay and incompetent so far as the facts stated in it are concerned, and if it is offered to prove the facts stated in it as true, we make that objection. If it is offered only as a part of the history of the transaction to show what came before the defendants, we have no objection.

The Court: It is received in evidence.

Mr. T. A. E. Weadock: We are entitled to this paper in evidence or we are not, without any qualification one way or the other.

The Court: The court has ruled on it and will hear no further discussion on it by either side.

Mr. T. A. E. Weadock: Note an exception both to the ruling and the statement by the court.

Q. I show you Exhibit 249. State whether that is one of the contracts you handed me this morning from the records of the Maltby Lumber Co.?

A. It is.

Mr. T. A. E. Weadock: I offer it in evidence.

The Court: That has not been identified, except he now says that is one of the papers he saw this morning.

Mr. John Weadock: This is a contract dated the 28th day of December, 1901, and made between the Maltby Lumber Company of Bay City, Michigan, as principal, and D. J. Ragan of Bay City, Michigan, and Frank L. Wanda of Bay City, Michigan, as sureties, of the first part, and Western Union Telegraph Co., of the second part. We have no objection.

The Court: It is received.

Q. I show you Exhibit 250, a contract dated January 8, 1902, between the Maltby Lumber Co. and the Western Union Telegraph Co., and ask you, is that one of the papers you handed me this morning from the papers of the Maltby Lumber Co.?

A. It is.

409 Mr. Weadock: I offer it in evidence.

Mr. John Weadock: No objection.

The Court: It is received.

Q. I show you Exhibit 251, consisting of a letter dated, Toledo, August 14, 1901, a contract between the Toledo and Western Railway Co. and the Maltby Lumber Co., dated March 20, 1901, and a contract between the same parties, first contract relating to ties, and a contract between the same parties relating to telegraph poles, and ask you whether that is one of the papers produced by you this morning as coming from the papers of the Maltby Lumber Co.?

A. It is.

Mr. T. A. E. Weadock: I offer it in evidence.

Mr. John Weadock: No objection.

The Court: It is received.

Q. I show you a contract, several papers fastened together, namely, an order of the American Telegraph & Telephone Co., being No. 27646, a letter dated December 26, 1901, a contract between the Maltby Lumber Co. and the American Telephone & Telegraph Co., dated December 12, 1901, all of which papers are attached together and marked Exhibit 252, and ask whether that was among the papers you produced this morning from the Maltby Lumber Co.?

A. It was.

Mr. T. A. E. Weadock: I offer it in evidence.

Received without objection.

Mr. John Weadock: Would it be agreeable to the court if I called a witness in rebuttal, who wants to get away?

Mr. T. A. E. Weadock: No objection.

G. W. AMES, sworn, testified as follows:

Examined.

By Mr. John Weadock:

I reside in Bay City and am a broker.

Q. In the matter of a sale of stock by Frank P. Chesbrough, please state whether Mr. Chesbrough came to you with reference to the selling of the stock, or whether you went to him, in May, 1902?

Mr. T. A. E. Weadock: I object to that as incompetent and
410 immaterial.

Mr. John Weadock: Mr. Chesbrough has stated all the facts and circumstances in relation to his sale of stock, how Mr. Ames came to him and just what he did.

Mr. T. A. E. Weadock: It is immaterial.

The Court: The objection is overruled.

Mr. T. A. E. Weadock: Give us an exception.

A. Mr. Chesbrough came to me.

Cross-examination.

By Mr. T. A. E. Weadock:

That was Mr. F. P. Chesbrough.

Q. What paper is this which you have in your hands?

Mr. John Weadock: I object to that as immaterial. He has not referred to it for the purpose of answering the question and we are not concerned with it.

Objection overruled and exception taken.

A. This is taken from my books of all the stock handled by either of the Chesbroughs.

Q. Let me see it please. (Paper handed to counsel.) When did you take this from your books?

A. Yesterday afternoon.

I didn't know I was to be a witness in this trial until this morning; I took that from my books yesterday afternoon because I expected I would be called; I expected to be called because questions were being asked of me; Mr. J. C. Weadock asked me questions yesterday afternoon, and then I went to my books and got this memorandum; I could tell you what occurred if I did not have the memorandum, but I could not give you the dates. I can tell you of the stock transactions for ten years without the books, but not the dates; I have several memorandums here for the reason that if called upon I would not know what stocks they had referred to, and I put them all down.

Q. You sold stock for F. B. Chesbrough?

Mr. John Weadock: I submit that is improper cross examination. Objection sustained and exception taken.

Q. You sold other stocks at that time for Mr. Curtis?

Mr. John Weadock: Same objection; objection sustained
411 and exception taken.

Q. You sold Bay City Building stock to Mr. Curtis?

Mr. John Weadock: If your Honor please, I desire to object to any question that is not cross-examination of the witness upon the subject matter about which he testified when examined in chief, and I submit that these transgressions of the well known rule ought not to be repeated.

Objection sustained and exception taken.

Q. You sold stock in January, 1902, January 17, for A. J. Cook, one of the directors of the bank?

Mr. John Weadock: Same objection; objection sustained and exception taken.

Q. On December 16th, 1903, you sold stock of Orrin Bump to Frank T. Woodworth?

Mr. John Weadock: Same objection; objection sustained and exception taken.

Mr. T. A. E. Weadock: That is all.

Mr. John Weadock: Do you excuse him?

Mr. T. A. E. Weadock: No, I am going to call him as my own witness now.

Q. Did you sell any stock on the 16th day of December, 1903, belonging to Orrin Bump?

Mr. John Weadock: That is objected to as immaterial. Objection sustained and exception taken.

Q. Did you sell any stock on the 26th of May, 1904, belonging to Orrin Bump? I mean of course, stock in the Second National Bank?

Mr. John Weadock: If your Honor please, I desire to withdraw the objection to the stock of December 16th, 1903, simply for the reason that we have already introduced testimony with reference to that sale. I did not recognize it when it was first put in, but it is the same sale that is already testified about as having been made to Mr. Woodworth.

The Court: If the objection is withdrawn, he may answer.

A. If that says December, that is the date I sold it. That is not always just the date it is sold, it may be sold the day before or two or three days before, but that memorandum is the day we close the deal.

412 Q. This says, December 16, 1903, Orrin Bump to Frank T. Woodworth, 100 shares Old Second National Bank for
1.45?

A. That is right.

Q. May 26, 1904—do you still object to that,—that is the last one.

Mr. John Weadock: No, I think not. That is the easiest way to get them in. No objection.

Q. May 26, 1904, Orrin Bump to E. T. Carrington 50 shares Old Second National Bank at par?

A. That is right.

Exhibit 250 read:

JAMES M. LEWIS (recalled).

Examined.

By Mr. T. A. E. Weadock:

Q. I notice at the right hand of the figures I have been reading in schedule A of Exhibit 249 some figures in pencil. Do you know who made those figures?

A. No, sir, I do not. I don't know whose handwriting it is; I don't know whether any of the poles provided for in contracts 249, 250, 251 or 252 were on hand at the time I took hold of the affairs in the office of the Maltby Lumber Company; Mr. Maltby would know what became of this property; I could not recall the prices obtained for property similar to that described in these contracts, namely, of the same lengths and diameters, etc., what prices they brought during the realization by the bank from the property of the Maltby Lumber Company.

Cross-examination.

By Mr. Clark:

I don't think Mr. McGraw had anything to do with the selling of the lands of the Maltby Cedar Co.; he sold a few on commission; where, in these papers, the River Rouge yard is referred to and in some "Detroit," I think that means the same yard. There is only one yard near Detroit and that is the River Rouge yard.

Examined.

By Mr. T. A. E. Weadock:

I don't think there are two yards at Detroit; I have been in the River Rouge yard; I didn't know there was another one; I was never in any but the River Rouge yard; I don't think there was any other yard; I never knew of another yard there; the River Rouge yard is down at River Rouge below Detroit; that is near Detroit.

413 Mr. John Weadock: Do you claim there was any yard in Detroit, other than the River Rouge, Mr. Weadock?

Mr. T. A. E. Weadock: I understood there was. I think there is only one yard at Detroit.

Mr. John Weadock: Yes, sometimes referred to as River Rouge and sometimes as Detroit.

Witness: The inventory of 1903, Exhibit 248, which you show me, I think that is the work of the stenographers in the office of the Maltby Cedar Company, where I was in charge of the finances; that inventory was made in that office; it was not made under *by* direction, it was made under Mr. Maltby's direction; I was there at the time; it is a question whether I checked it over or whether some of the clerks checked it; I do not know whether the prices in that inventory compare with the prices or are for the same material as the prices mentioned in the contracts that have been read this morning; I never compared to see whether it did or not; I never went over the inventory and the sales to see whether or not I was getting the price at which the stuff was inventoried; after 1904, the management of the prices and the sales of the personal property turned over by the Maltby Lumber Company to the bank, was in the hands of the directors of the Maltby Cedar Co.; Mr. Maltby went away some time toward the fall I think, of 1904, after the organization of the Maltby Cedar Company; Mr. Maltby had charge when the Maltby Cedar Company was organized; I cannot recall the date he left; after he went away, I had charge of the sales under the direction of the board of directors; we advertised these poles and ties and shingles for sale in papers that carried that kind of advertising,—of the poles and ties and such stock as that.

Q. In what manner was the poles sold after Mr. Maltby went away?

A. They were sold by mail inquiries, answers to our advertisements.

The business was being curtailed as fast as it could; no new contracts were made.

Q. State whether or not contracts already made were carried out if you didn't have the material for them?

Mr. John Weadock: Do you refer to contracts of the Maltby Cedar Co., or Maltby Lumber Co.?

Q. I refer to the Maltby Lumber Co.

A. I do not recall that there were any contracts,—I could not answer the question.

414 Q. Do you remember about the contract with the Pere Marquette Railroad Company, that Mr. Maltby refers to when he says there was a loss of \$40,000?

A. I think there were contracts with the Pere Marquette Railroad Company.

I could not answer as to whether they were carried out or not; I could not say they were not carried out; the Maltby Cedar Company kept books; part of those books are in the Phoenix Block and part of them in the office of Spear & Lewis; I think some are in the bank vault and some in the storage room on the fourth floor in the Phoenix Block; I think those books will show the entire amount received as the proceeds of these securities.

Q. Can you look at those books and take from them a statement of the entire amount received during the years 1903-4?

Mr. John Weadock: I submit, that is improper, incompetent and immaterial. Counsel has put this witness on as his own witness.

The Court: Under the rule you are asking him whether or not he is able to do a certain thing. The objection is sustained.

Exception.

Q. I show you a bundle of papers fastened together with a wire clip, marked Exhibit Y on the former trial and ask you what they are?

A. They appear to be a statement from Mr. Colford to Mr. Andrews of the stock shipped from Temple, and also a statement showing the stock on hand at Temple.

I could not tell you who Mr. Colford is; I don't know that I ever saw the gentleman,—I don't know him. I understand there was such a man looking after matters at that point; he was looking after the Maltby property that was turned out, at Temple; I don't think the Maltby Lumber Company paid him; I don't know who did pay him; I wouldn't know Colford's handwriting; I don't recall whether I paid his expense bills or whether Mr. Andrews paid them,—I didn't pay them; I don't think I paid them.

Paper marked Exhibit 253.

Mr. T. A. E. Weadock: I have not offered the exhibit, but I will withdraw it for the reason, that the dates antedate the period in question.

The papers which you show me are the Colford reports and one of them appears to be a report of Colford and McGraw.

Testimony of John M. Carswell read from former record by consent of counsel, as follows:

415

John M. Carswell.

Examined.

By Mr. Courtwright:

John M. Carswell, a witness familiar with the timber business, made an examination of the property of the Maltby Lumber Company, upon which he spent four or five months, from August to December, 1903. He visited Alpena, Pinconning, Onaway, Mackinaw, Boyne Falls, Detroit, River Rouge and a good deal of property that was scattered at different places along the railroads and branches. He did the work under instructions from Judge Collins, attorney for the bank. He made inventories of the property and a report in writing which he turned into Judge Collins. The Maltby Lumber Company had a shingle and tie mill near Boyne Falls. He made separate reports from time to time as he visited the different places and mailed them to Judge Collins. About three weeks was the longest time he was away at one time. He made such investigations at different points where property was situated and which satisfied him that the property was that of the Maltby Lumber Company. The property he invoiced was all marked "Maltby Lumber Company." The timber and other forest products were in the yards and banking grounds along the railway track, etc. The Maltby Lumber Co. had

a large yard at the River Rouge, with a considerable quantity of ties, poles and posts in that yard. The witness had plats of the lands of the Maltby Lumber Co. and examined those. He was a competent person in the examination of ties, telegraph poles, fence posts, shingles and timber and farming lands. Witness devoted all of his time from August 1st to Dec. 19th, 1903, in investigating the assets of the Maltby Lumber Co.

Cross-examination.

By Mr. Clark:

The general practice that I followed in making these reports was to make a separate report from each camp or yard or location as I examined it. As I finished with one location I made that report in the form of a letter which I mailed to Mr. Collins. On the land and timber also I made a separate report from each township and writing as I finished it, giving a description of each parcel of land. I did not wait till I got all through to make that report, but I made it from time to time, and usually as I finished each township or county. There would be a report probably each week, or sometimes more, one or two. Sometimes I think I would average more than one a week. I did not know anything about the titles to this prop-

erty, whether it was good or bad or whether the personal property had been paid for or whether it had been sold and belonged to somebody else. I knew that there was some in some places, that is, I was told by the men in charge that some of it had been sold. It was lying there along the track and if I had not been told I could not have known. So that, in other places, there may have been others in the same situation that I was not told about and would not know about.

Q. Take the River Rouge yard, was your attention called to any poles there that had been shipped to the telegraph companies in care of the Maltby Lumber Co., at the River Rouge, or in Pinconning?

Q. I will re-state the question. If there had been telegraph poles shipped to the River Rouge yard, and the Pinconning yard, and consigned to somebody else in care of the Maltby Lumber Co., do you know whether or not you inspected those poles?

A. Not unless I was told.

Q. You do not know who the stuff belonged to there except that it was in the Maltby Lumber Co. yard?

A. That is all I knew. They were marked with the Maltby Lumber Co. mark. I presume that property so marked stayed there after it was sold as well as before and the mark might be put on it before it was paid for. I did not inspect those poles unless I was told to.

Q. Take those mills that you spoke of, you don't know that the Maltby Lumber Co. owns those mills, do you?

Mr. T. A. E. Weadock: I object to that as incompetent.

Objection overruled; defendants excepted.

A. I don't know who owns a mill any more than I was told. There was a large amount of land upon which I put no valuation.

Q. And even where you put a valuation on it as good farming land, the best of it was in the possession of squatters or settlers, was it not?

A. No, not in all cases. There was some squatters. I do not remember how much there was that I placed a valuation upon. I would not say that it exceeded ten or twelve thousand dollars.

(Recess until 1:30.)

(Afternoon Session.)

Defendants then offered to show by Frederick P. Browne, cashier of the First National Bank of Bay City continuously for 28 years and still cashier of that bank, and it was agreed by counsel that the testimony of Mr. Browne as it appeared in the printed record of this case in the Court of Appeals on the previous trial, should be offered as if the witness were personally present. Defendant offered to show what the custom in Bay City was during the time in question here with reference to signing of reports by directors.

The court held that custom was immaterial and excluded the testimony to which defendant excepted.

The witness was asked these questions:

Q. State whether or not, during your incumbency of the office of cashier of the First National Bank, it has been the custom of the directors of that bank who were called upon to attest the report, from time to time, which was sent, to the comptroller, to sign the report when prepared and verified by the cashier, making no further examination of the affairs of the bank than, in some instances, to compare the report with the previous report, or with the daily statement of the bank, to see whether or not it actually compared with the statement?

Objected to as leading, incompetent, irrelevant and immaterial; objection sustained and defendants excepted.

Q. State whether or not, in any case, any director of the First National Bank of Bay City, who was called upon to attest a report sent to the comptroller, made any other investigation of the affairs of the bank prior to his attesting the report than to look at the books of the bank and see whether or not the statement compared with the book?

Objected to as before; objection overruled and defendants excepted.

Mr. T. A. E. Weadock: In connection with this testimony, I offer to show by the directors of the several banks in Bay City, the same things which I offered to show by the last witness; to this the same objection was made and the same ruling and defendants duly excepted.

The Court: The testimony may be made to appear in this record as having been offered and excluded entirely on the ground that it

is irrelevant and immaterial to this issue. You may have the benefit as though you had called the witness and had him here.
Defendant excepted.

Mr. ANDREWS (Recalled).

Examined.

By Mr. T. A. E. Weadock:

Q. I show you a number of papers purporting to be signed by William Colford, dated April 28th, 1904, April 29, 1904, March 7, 1904, attached together and marked Exhibit 254, and ask you whether those were reports from William Colford in reference to this Maltby Lumber Co. property?

A. They are.

Mr. T. A. E. Weadock: I offer in evidence a letter marked "New Toledo April 28, 1904," a second letter "New Toledo, April 28, 1904," report from Gaylord, April 29, 1904, and a report from Moore's siding, March 7, 1904,—Moore's siding and other places.

Mr. Clark: We have no objection. We do not concede anything for them of course.

Mr. T. A. E. Weadock: I except to the statement made by counsel.

The Court: These are, as I understand it, the reports just referred to in the testimony of Mr. —.

Mr. T. A. E. Weadock: No. These are the Carswell reports, and these are the Colford reports, and Mr. Colford is dead.

Witness: I never knew William Colford, I met him personally; he made some examination of this property, and he made reports; I understand he is now dead.

Paper dated New Toledo, April 28, 1904, to M. M. Andrews read:

Mr. T. A. E. Weadock: The next paper is not offered.

Statement of Maltby's poles, posts and ties at Moore's Siding, March 7, 1904, read:

Witness: The bank paid the expenses and salary of William Colford; maybe I have some of the reports made in writing by William Carswell to Judge Collins. I did not look particularly for them.

Mr. T. A. E. Weadock: I offer to show that this litigation was commenced first in the state court in July or the first of August of 1905.

Mr. Clark: We have no objection to showing that. It is not this litigation. There was an action brought by Mr. Woodworth against Mr. Chesbrough.

Mr. T. A. E. Weadock: Against these defendants and about this same matter.

Mr. Clark: It was superseded by this case in this court.

Mr. T. A. E. Weadock: It was not superseded. Those cases were discontinued and this case commenced.

419 Mr. Clark: This case commenced at the same time.

Mr. T. A. E. Weadock: No, this case was not commenced at the same time. This case was commenced March 31.

Mr. Clark: At the same time the other was discontinued.

Mr. T. A. E. Weadock: Yes, following the time the other was discontinued.

Witness: I do not know at what price and at what date Mr. Woodworth sold his stock in the Second National Bank. The date is down in the stock book there; I think he sold all of his stock in the Second National Bank to some of the directors personally, October 16th, 1911; it was all sold at that date; I don't know the price.

F. T. WOODWORTH (Recalled).

Examined.

By Mr. T. A. E. Weadock:

I desire to ask Mr. Woodworth one question on cross examination under the statute. I assume your honor's ruling will be the same as before.

Mr. Clark: This is a new subject. I think he is their own witness on this subject.

Mr. T. A. E. Weadock: No, I called him first on that before. I presume your honor will make the same ruling.

The Court: Yes.

Mr. T. A. E. Weadock: Note an exception.

Q. For what price did you sell your stock in the Second National Bank?

A. As Mr. Andrews testified, a year ago last October.

Q. That was the date, but what was the price?

A. I think 1.05.

Examined.

By Mr. John Weadock:

Q. Had the par value of the stock been changed after your purchase?

Mr. T. A. E. Weadock: I object to that as incompetent. It is already in evidence.

Objection overruled and exception taken.

A. It certainly had. The bank——

420 Q. Had the par value of the stock been changed?

A. Oh no, not the par value, no.

It still remained at a hundred dollars a share, but it had been cut in two, so that where I purchased fifteen and one-half shares it resulted in my getting seven something,—seven and a quarter.

Q. Had you received any dividends on this stock during the time that you held it?

Mr. T. A. E. Weadock: I object to that as immaterial and incompetent and not proper redirect examination.

Objection overruled and exception taken.

A. The first year I owned it I received one dividend of five per cent. semi-annual dividend.

That was a semi-annual dividend; I received nothing after that; I sold it a year ago last October; I paid for this stock, I think an average of 152 or 3, and it was afterwards cut in two and sold for 105.

Q. Outside of the question of dividends or interest on your investment then that would mean a loss of how much on the purchase so made. Would it be more or less than 100 dollars a share?

Mr. T. A. E. Weadock: That is objected to as a matter of mathematics.

Objection overruled; and exception taken.

A. Why, what I paid for a share cost me 1.52. It would stand me in about three dollars and four or five cents a share,—when it was cut in two cost me that. After carrying it eight or nine years, I sold it for 1.05 losing interest on it and everything else.

Re-examined.

By Mr. T. A. E. Weadock:

Q. From 1905, after the time that you resigned from the board of directors of the Second National Bank and since you commenced this litigation in behalf of yourself and your relatives, state whether or not the litigation has been pending in one form or another or in one court or another, ever since then until now?

Mr. John Weadock: I object to that as immaterial.

Objection sustained and exception taken.

Q. State whether or not that has not depreciated very much the value of the stock?

Objection as before; objection sustained; exception.

421 M. M. ANDREWS (recalled).

Examined.

By Mr. T. A. E. Weadock:

Q. State whether or not, statements or reports of the face of the report to the comptroller of January 11, 1905, being Exhibit 170, and which was signed by Mr. Woodworth, the plaintiff in this case, was published in the Bay City Tribune soon after the date of the report?

A. It was.

The same is true with reference to the report of May 29, 1905, Exhibit 169, which was attested and signed by Mr. Woodworth. Each of these publications was in the Bay City Tribune, the same papers that the others were published in.

JAMES M. LEWIS (recalled).

Examined.

By Mr. T. A. E. Weadock:

Among the securities turned out by the lumber company were some Angola bonds; I don't recall the amount of those bonds, but I think it was somewhere about seven or eight thousand dollars; I have no paper here that will show; Angola is down in Indiana about half way between Jackson and Fort Wayne.

Q. Look at your inventory of October 31st, 1904, total bonds \$5,700. Were those the bonds?

The Court: That has not been offered in evidence yet.

Mr. T. A. E. Weadock: Yes. I don't remember whether I offered 1904 or not, but 1902 and 1903 have been.

A. I don't remember whether those are the bonds or not.

They had bonds other than the Angola bonds, I think, for a road which was projected between here and Saginaw on the west side of the river, which never materialized; I have forgotten the name of the road; I don't think those bonds were sold for fifty cents on the dollar; I think they were sold under the supervision of Mr. James E. Davidson; and the proceeds of those bonds went to retire this \$10,000,—it went on the indebtedness; they were sold for the best price obtainable; I took the bonds myself, under instructions from the board to Fort Wayne in the hopes that I could sell them for 50 cents on the dollar to parties interested in the road and trust company, and we did not succeed, and I brought the bonds back and the road afterwards went into the hands of a receiver and they were sold for what—I don't know who wanted them, but they were
422 sold in the regular course, in the hands of the receiver; I mean by the regular course, I understand they went through the courts in the same way and the property was appraised and we got out of it all we appraised them.

Examined.

By Mr. Clark:

These bonds represented a deal of Mr. Maltby; I won't say whether it was before or after the bank took hold; it was an early proposition anyway. I don't say whether it was before or after the bank took hold, and it was a deal of Mr. Maltby's own.

Examined.

By Mr. T. A. E. Weadock:

Mr. Maltby did not sell the bonds.

Q. Part of the Maltby security, as I understand?

A. They were to secure a debt of that road.

Mr. Clark: Will it be conceded—

Mr. T. A. E. Weadock: That all the deeds made to James David-

son by Maltby or the Maltby Lumber Co. or Maltby Cedar Co., was made to him as trustee for the Second National Bank.

Mr. Jno. Weadock: No, not as trustee. His name did not appear as trustee.

Mr. T. A. E. Weadock: In some of them he is.

Mr. Clark: Also, we want it conceded that where it expresses a consideration in the deed no consideration was ever paid.

Mr. T. A. E. Weadock: That I cannot concede.

Mr. Jno. Weadock: If there was a deed and consideration paid, there would not be a security.

Mr. T. A. E. Weadock: They were secured for the land whatever they were.

Mr. Clark: And they did not pay the money that was stated in the deed.

Mr. T. A. E. Weadock: I suppose not. This is exhibit 126. The one that was offered and withdrawn. I now offer that in evidence.

The Court: It will be received. (Read.)

The following exhibits were also offered and read: Exhibits 139, 140, 141, 142, 143, 144, 145, 146, 147, 138.

423 M. M. ANDREWS (Recalled).

Examined.

By Mr. T. A. E. Weadock:

Mr. Woodworth sold a certain part of his shares of stock to me in March, or some time; there are two items of the same amount there, I think it was on March 23, 1905, that he sold to me; I got two and a half shares at 1.50.

Examined.

By Mr. Clark:

That was at the time I went on the board; at the time my stock was cut in half, it was by the reduction of the capital stock, or soon after.

Q. And you didn't have enough stock left to qualify as a director, did you?

Mr. T. A. E. Weadock: I object to that as incompetent and immaterial and not proper cross examination.

Objection overruled and exception taken.

A. No.

I had to have a little more stock so that I would have enough to be a director, and Mr. Woodworth turned this over to me for that purpose. I bought it for that purpose.

Q. And it was fully understood at the time that it was for that purpose and for that you——

Mr. T. A. E. Weadock: I object to that as incompetent and immaterial.

Q. It was fully understood at that time it was solely for that

purpose, and irrespective of the value of the stock at the time, was it not?

Mr. T. A. E. Weadock: I object to that as incompetent and not proper cross examination.

Objection overruled and exception taken.

A. That question was not raised at all at the time.

Q. That was the understanding, was it not?

Mr. T. A. E. Weadock: I object to that as incompetent.

A. It was for that purpose that I bought it.

The Court: Sustained. As I understand his answer, he said that there was not any arrangement upon that subject.

Q. The transaction was not an immediate purchase and sale of the stock, but was a device to carry out the object of qualifying you to serve on the board of directors, was it not?

424 Mr. T. A. E. Weadock: I object to that as incompetent because it was an ordinary sale of stock, and the gentleman so says.

Objection overruled and exception taken.

A. It was an actual sale.

With reference to the purchase of the stock, as a business proposition, it was an actual sale on my part; the price was fixed by Mr. Woodworth and I paid him his price; as to the purpose of the sale, I might have stated at the time that I needed that much more; I believe it was after the stock was cut in half.

Mr. Humphrey: You did not mean 1.50 a share did you?

A. No. \$150 a share.

Mr. Clark: That meant \$75 for each original share before it was reduced?

A. Yes.

Mr. Humphrey: Defendants' counsel renew their motion made at the close of the plaintiff's proofs, that the court direct a verdict in favor of the defendant Chesbrough for the reason that there is no claim or allegation made in the declaration in this case charging defendant Chesbrough, or the board of directors of the bank with failing to write off any part or portion of the loans and discounts of the bank after knowing that a part or portion of the said loans and discounts would result in a loss and that, in the absence of any such charge or allegation in the declaration, no evidence of such facts are counted on and that all evidence showing or tending to show the failure of the board of directors to write off any part of the loans and discounts are stricken from the record and withdrawn from the consideration of the jury.

The Court: The motion is overruled.

Exception taken by defendants.

Mr. Humphrey: We make the same motion in regard to defendant McGraw.

Motion overruled and exception taken.

Mr. Humphrey: And for both defendants, McGraw and Chesbrough.

Motion overruled and exception taken.

Mr. T. A. E. Weadock:

Now, I move to strike out of the case, anything in the case relating to anything after Nov. 17, 1903, with the exception of the two reports signed by Woodworth of January 11 and May 29, 1905, for the reason that the second opinion of the Court of Appeals, paragraph 2, holds, that the defendants' liability cannot be estimated as of any date later than November 17, 1903, their latest act, which was constructively a representation of fact by them to the plaintiff on that date, and therefore the stock purchase of December, 1903, and all testimony in the case relating to a date after November 17, 1903, should be stricken out.

The Court: The motion is denied. Exception taken.

Thereupon, the defendants requested the court to charge the jury, as follows:

1.

I charge you that this action does not involve any issue of negligence, and that you have no right to find a verdict in this case based upon any evidence showing or tending to show that the defendants, or either of them, were guilty of negligence in this case in failing to make a more thorough and systematic examination or inspection of the loans and discounts than such as was ordinarily and usually made in such bank.

2.

I charge you that as appears from the evidence in this case the Maltby line of credit, so-called, was all contracted and outstanding prior to the time that the plaintiff became a stockholder in said bank, and that prior to the time of plaintiff's becoming a stockholder in said bank this line of credit to the Maltby Company was being reduced, and you have no right to take into consideration any act or neglect of the officers of the bank or either of them, with reference to the making or contracting of said loans to the Maltby Lumber Company, as the defendants, nor either of them, are liable to the plaintiff for any act of the bank's officers in the making or contracting of said loans.

3.

I charge you that the underlying wrong if such wrong was committed in this case, was in the failure of the Board of Directors of the bank to write off such part or portion of the loans and discounts as they then knew to be bad; and I charge you that no such claimed wrong is counted upon by the plaintiff in his declaration, and you have no right to consider the fact of the failure of the Board of Directors to write off any portion of said loans, as the plaintiff is not entitled to recover in this case any damage that might or could be occasioned by such action or failure to act.

4.

I charge you that the Board of Directors consisted of seven members at the time this grievance, of which the plaintiff complains occurred, and that no two members or three members of the board
426 would have the right or power to write off any part or portion of the loans and discounts; and that in order to write off any part or portion of said loans or discounts as uncollectible, it required the action of at least four members out of the seven members of the Board of Directors in favor of the same; and that these defendants, or either of them, can not be made liable for the failure of the Board of Directors to act in this regard, in the absence of any evidence showing or tending to show that they, or either of them prevented such action.

5.

I charge you that the knowledge of the falsity of a report or the untrue statements contained therein, must have been known to the defendants at the time they signed the report, and you have no right to find a verdict against the defendants, or either of them, for and on account of any knowledge or information that they might have obtained after the publication of the report, and which came to them subsequent to its publication, and was not known to them at that time that the report was attested to by them, or either of them.

6.

I charge you as a matter of law, that under the statutes of the United States providing for the making of the reports complained of, that the Comptroller of the Currency has a right to, and does call, for the reports of the bank upon some past date not known to the directors of the bank, or any of them, until such call is made by the comptroller; and I charge you that it is not required by the directors of the bank, or either of them, that they count over the cash, examine the loans and discounts, or make any examination of the bank, as they would not, and could not have the knowledge that would enable them to make such examination, on the date, so named by the comptroller.

7.

I charge you as a matter of law that the comptroller's request for such reports to be made by the bank, and naming a past date upon which the report is to be made, imperatively commands and requires the officers of the bank to report the condition of the bank, as shown by the bank's books, on the date named by the comptroller, and that any change in the report from the condition of the bank as shown by the books, would constitute a false report and would render each officer of the bank knowingly participating therein, liable to the penalties provided in said Act for making a false report.

8.

I charge you that the duty of charging off from the books of the bank any part or portion of the loans and discounts as bad
427 and uncollectable is a duty that devolves upon the Board of Directors of the bank, and a failure to perform such duty by the board, if the duty existed, would not create a liability against any director who did not know that such loan or discount was bad at the time of the making of such report to the Comptroller of the Currency, as to the condition of the bank.

9.

I charge you that if you find from the evidence in this case that the plaintiff did not rely upon the published reports of this bank, in making his purchase of stock, but had or sought and obtained independent information regarding the bank's condition, upon which he did rely in making said purchase, then you would have no right to find a verdict in favor of the plaintiff in this case against the defendants, or either of them, and your verdict should be in favor of the defendants of no cause of action.

10.

I charge you that no absolute duty devolves upon the directors of the bank to charge off any part or portion of the loans and discounts, because the directors, or any of them, believe that a part or portion of such loans and discounts are uncollectible, as such board has an honest discretion as to the amount of paper which it may carry after it has become presently uncollectible, and that in order for you to find that the board of directors neglected its duty to the plaintiff in failing to charge off any part or portion of the loans and discounts held by this bank, known as the Maltby Lumber Company paper, you must further find from the evidence in this cause that the Board of Directors, as a board knowingly acted dishonestly, and in bad faith, in carrying the whole of this Maltby paper, as live paper, among the loans and discounts of the bank at its par value.

11.

I charge you that the fact that it was found that the railroad companies and telegraph companies with whom Maltby was dealing, did not owe the Maltby Lumber Company as much as claimed by him, would not make it obligatory upon the directors to charge off this Maltby Lumber Company paper, or any of it, providing you find that the Board of Directors then believed that said paper would be paid, or that security had been given for the payment of the same to the bank.

12.

I charge you that before such duty to charge off the Maltby Lumber Company paper, or any part of it, devolved upon the
428 Board of Directors of the bank, it must have been known to them that said paper would not be paid either through

375

Maltby, the Maltby Lumber Company, or the securities given by the Maltby Lumber Company to the bank, and that until the Board of Directors had sufficient information so that they had the knowledge that a substantial part or portion of the paper, would not be paid by anyone to the bank, that they would have a right to carry such paper, among the loans and discounts of the bank, at its face value.

13.

I charge you that a director of a bank, who takes no action to write off any part or portion of the loans and discounts carried upon the books of the bank, is not a guarantor of the collection of such loans and discounts; and would not be liable to any person in damages, though it should afterwards turn out that he was mistaken in believing that they were good and collectible from the fact that they afterwards in a fact turned out to be bad and uncollectible.

14.

I charge you that you have no right to consider the evidence of Spencer O. Fisher as to a talk he had with the defendant Chesbrough on the train in May, 1902, as showing or tending to show that Chesbrough's knowledge and belief as to the collectibility of the Maltby Lumber Company paper, in June and September, 1903, and at a time, after the Maltby Lumber Company had turned over to the bank all of its property and assets as security for such indebtedness.

15.

I charge you that if you find from the evidence that the Board of Directors of the bank, as a board, believed that the Maltby Lumber Company paper was collectible and would be paid, that they had a right to declare and pay the dividends paid by the bank in the year 1903, which are complained of by the plaintiff in this case, and that under such circumstances the payment of the dividends would constitute no evidence showing or tending to show liability upon the defendants in this case, or either of them, on account of the claimed losses suffered by the plaintiff through his purchase of the capital stock of said bank.

16.

I charge you that as appears by the undisputed evidence in this case, the situation and condition of the bank was referred to Judge Chester L. Collins, the then attorney for the bank in 1903, and that as such attorney, he advised the Board of Directors that they should
429 declare and pay a dividend to the stockholders, and that the directors of the bank, if acting in good faith, had a right to rely upon the advice of their attorney, and order said dividend paid, and that no liability would attach to these defendants, or either of them, on account of the payment of such dividend through losses sustained by the plaintiff through such payment or on account of the loans and discounts then held by the bank being afterwards found to be worthless and uncollectible.

17.

I charge you that if you believe from the evidence in this case that the defendants in February, April, June, September, and November of the year 1903 then believed that the paper then in the bank discounted by the Maltby Lumber Company would be paid, either through the drafts or through the securities before that time given to the bank by the Maltby Lumber Company and the Maltbys, and that no loss would be suffered to the bank through such paper, then I charge you that the plaintiff is not entitled to recover in this cause, and you would have no right to consider the testimony given in the case showing, or tending to show, that losses did occur and were written off by the bank in the year 1905.

18.

I charge you that it appears from the evidence that the plaintiff Woodworth in January, 1905, as a director of the bank signed a report to the Comptroller of the Currency similar to the one signed by the defendant in this case, and that included in said report signed by the plaintiff as a director was included all of the Maltby paper at its face value; and I charge you that you have a right to consider this report as evidence tending to show that the plaintiff then believed the Maltby Lumber Company line of credit to be good, and that no loss would be sustained thereby, and this evidence may be considered by you as evidence tending to show the good faith of the defendants in signing the reports of 1903.

19.

I charge you that the plaintiff, Woodworth, in May, 1905, signed the report to the Comptroller of the Currency as a director of the bank, which report included \$88,000.00 of the Maltby Lumber Company paper reported in loans and discounts as "Good," and I charge you that it is your duty to consider such evidence as showing that the plaintiff, Woodworth, at the time considered this \$88,000.00 of the Maltby Lumber Company's paper as good, and as evidence showing that the defendants had a right to and did believe the paper to be good when they signed the reports in the year 1903 now complained of by the plaintiff in this case.

20.

I charge you that on this question of the defendants' knowledge that any part of the Maltby Lumber Company paper, so-called, was bad and uncollectible in the year 1903 when these reports to the Comptroller were attested, now complained of, that you have no right to take into consideration any evidence of anything that transpired or came to their knowledge after November 17th, 1903, the date when the last report complained of in this case was made; and I charge you that all evidence of transactions occurring after said date of November 17, 1903, with reference to defendants' knowledge at that time, are hereby withdrawn from your consideration, and

that you have no right to consider such evidence on the subject of the defendants' knowledge at the date of the signing of these reports.

21.

I charge you that as appears from the evidence, the defendant, Chesbrough, signed but two reports; one of April 9th, 1903, and the other of November 17th, 1903, and that no other of the reports complained of was made by him as a director; and I charge you that under the evidence in this case, you would have no right to find a verdict against the defendant, Chesbrough for and on account of the making of the reports by any other of the directors, or for and on account of any knowledge possessed by any other of the directors, except the said Chesbrough himself at the time of the making of these two reports.

The court gave only such portions of the requests as are included in the general charge to the jury.

Charge.

Gentlemen of the Jury: You are nearing the end of this lengthy trial, and with the completion of this trial, you will close your duties for this term of court, which has covered a period of seven weeks.

Within a few days the curtain will fall on the year of 1912. As we approach the completion of important events, it is right and natural that we become serious and thoughtful, and that our desires and efforts to do our work and duties well will be necessarily increased.

From my observation of the conscientious manner in which you have met every duty at this term of the court, and the careful attention which you have given to this case, I can do no better and ask no more than that you continue to apply yourselves in the same way to the case until your verdict has been rendered.

431 You have listened to the proofs that have been admitted in evidence, and you have heard the arguments of able counsel, and it is now the duty of the court to state to you the law governing the case, and to define the issues of fact to be submitted to you.

Plaintiff's action is based on a claimed violation of certain sections of the United States Revised Statutes, commonly known as the National Banking Act. It is plaintiff's claim, that the defendants who were directors of the Old Second National Bank knowingly violated certain provisions of the act referred to during the year 1903, and in consequence thereof plaintiff was damaged, and the defendants are liable for his damages. This is disputed and denied by the defendants.

By section 5211 of the Revised Statutes it is, and was in 1903, made the duty of each bank, on the request of the comptroller of the currency, to make not less than five reports in each year. These reports are not only required to be verified by the oath or affirmation

of the president, or cashier of the bank, but, also, to be attested by the signature of at least three of the directors. Publication of such reports is required to be made in a newspaper published in the place where the bank is located. By necessary implication this statement or report is required to be a true report of the condition of the bank, and the making and publishing of a false report is prohibited.

Another section, section 5199 of the Revised Statutes, provides that the directors of such bank may semi-annually declare a dividend of so much of the net profits as they shall judge expedient. Section 5204 further provides that no banking association, or any member thereof shall withdraw or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital, and that if losses have at any time been sustained equal to or exceeding the undivided profits then on hand, no dividend shall be made. Further, that no dividend shall ever be made by any banking association while it continues its banking operations to an amount greater than its net profits then on hand, deducting therefrom its net losses and bad debts. Another section of the act, section 5239, provides among other things that if the directors of any national bank shall knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of the act, every director who participated in or assented to such violation shall be held liable in his personal and individual capacity for all damages which any person shall have sustained in consequence of such violation.

432 The making and publishing of the reports referred to are not merely for the information of the comptroller of the currency, but are to guide so much of the public as may have occasion to act thereon, and anyone who buys stock of the bank in reliance upon a false report of its condition, and suffers damage thereby has a right of action under section 5239 of the Revised Statutes against any director of the bank who knowing its falsity authorizes such report.

If plaintiff bought stock in the bank in reliance upon such a report as he claims, he was within the class — persons who are within the application of the statute. This action does not involve any issue of negligence, and you have no right to find a verdict in this case based upon any evidence showing or tending to show that the defendants or either of them were guilty of negligence in this case in failing to make a more thorough and systematic examination or inspection of the loans and discounts than such as was ordinarily and usually made in such banks.

As appears from the evidence in this case the Maltby line of credit, so-called, was all contracted and outstanding prior to the time that the plaintiff became a stockholder in said bank, and that prior to the time of the plaintiff's becoming a stockholder in said bank this line of credit to the Maltby Company was being reduced. And you have no right to take into consideration any act or negligence of the officers of the bank or either of them with reference to making or contracting of said loans to the Maltby Lumber Company, as the defendants nor either of them are liable to the plaintiff for any act

of the bank's officers in the making or contracting of said loans. The directors in such a case are not excused merely, because they may have acted in good faith in making the original loan, nor are they liable merely because of their negligence then or subsequently, but the primary question is whether defendants caused or permitted to be made a statement of the bank's condition upon which plaintiff relied to his injury, and which they knew was materially false.

Plaintiff's declaration contains a number of separate paragraphs or counts. The third, sixth, seventh, eighth, and ninth are not submitted to you. Those submitted to you are the first, second, fourth, fifth, and tenth, except such part of the tenth as refers to the ninth count, and this part of the tenth is withdrawn with the ninth count.

The tenth count as submitted to you alleges among other things that the defendants knowingly permitted and assented to the violation of the National Banking Act by permitting and assenting to the publication of the five false reports of the resources, liabilities and condition of the bank during the year 1903, and also, by permitting and assenting to the declaration and payment of dividends on or shortly before December 1, 1902, and on or shortly before June 1, 1903, and on or shortly before December 1, 1903, knowing that loss had been sustained equal to or exceeding the undivided profits then on hand, and that these dividends would necessarily be paid out of the capital stock of the bank. It is claimed that all of these violations of the statute were part of a general design on the part of the defendants to deceive the public. This part of plaintiff's claim stated in the tenth count therefore treats all of the defendants' acts as part of one general design to deceive the public, and treats all of plaintiff's purchases and damages as resulting from this design, and recoverable as a whole.

In addition to the tenth count of the plaintiff's declaration, which is referred to there are the first, second, fourth, and fifth counts, which rely respectively on the reports of February 6, April 9, September 9, and November 17, 1903, and treat each purchase of stock by plaintiff as a separate cause of action resulting from the publication of the preceding report. These counts therefore enable you to consider each report and each purchase by itself, if you think they should be so considered. Plaintiff does not claim, and is not required to prove that the defendants actually signed their names on the copies of the report which were sent to the printer, or that defendant, Chesbrough, signed all of the reports, or that his name was printed on all of them.

Under the statutes of the United States providing for the making of the reports complained of the comptroller of the currency has a right to and does call for the reports of the bank upon some past date not known to the directors of the bank or any of them until such call is made by the comptroller. And the defendants or either of them cannot be held liable, because they did not count over the cash, examine the loans and discounts or make any examination of the bank after the report had been called for and before it was made.

The underlying fault, if any such was committed in this case, was

in the failure of the board of directors of the bank to write off such part or portion of the loans and discounts as they then knew to be bad, if any. The contents of the reports were the automatic results of the bookkeeping in the bank. Whatever the books and the daily statements showed the resources to be appeared as resources on the report. If a line of paper was carried at its face value among the loans and discounts on the books, it would normally appear at that same amount in every one of the five reports in each year. If the defendants knew this, and it is my memory of the testimony that they both admitted that they did, it is not important whether both of them or either of them attested each report. Under such circumstances, the directors who participated in and approved a long continued carrying on the books among the loans and discounts of a line of paper which they know is worthless, if they did so know, and in amount sufficient to materially affect the standing of the bank, if they did so know, are bound to know that under the practice prevailing in this bank such worthless paper will become an element of the published reports, and that these reports will in so far falsely report to the public the bank's condition, and so in a fair sense such director permits the making of a report which is a violation of the act. For these reasons the act upon which liability depends is not the signing of the report itself, but the failure to make reasonable personal efforts to induce the board to charge off assets which have become worthless, if assets have actually at that time become worthless, and are at that time known to said director to be worthless.

The board of directors consisted of seven members at the time this transaction of which the plaintiff complains occurred. No two members or three members of the board would have the right or power to write off any part or portion of the loans and discounts, and in order to write off any part or portion of said loans or discounts as uncollectible, it required the action of at least four members out of the seven members of the board of directors in favor of the same, and these defendants or either of them cannot be made liable for the failure of the other members of the board of directors to act in this regard. The duty of charging off from the books of the bank any part or portion of the loans and discounts as bad and uncollectible is a duty which devolves upon the board of directors of the bank, and the failure to perform such duty by the board, if the duty existed, would not create liability against any director who did not know that such loan or discount was bad at the time of the making of such report to the comptroller of the currency as to the condition of the bank. The fact that it was found that the railroad companies and telegraph companies with whom Maltby was dealing did not owe the Maltby Lumber Company as much as claimed by him would not make it obligatory upon the board of directors to charge off this Maltby Lumber Company paper or any part of it, providing you find that the board of directors then believed that said paper would be paid or that reasonably good security

had been given for the payment of the same to the bank,
435 Before such duty to charge off the Maltby Lumber Company paper or any part of it devolved upon the board of directors of the bank, it must have been known to them that said paper would not be paid, either through Maltby or the Maltby Lumber Company, or the securities given by the Maltby Lumber Company to the bank, and that until the board of directors had sufficient information so that they had the knowledge that a substantial part or portion of the paper would not be paid by anyone to the bank, they would have a right to carry such paper among the loans and discounts of the bank at its face value.

A director of the bank who takes no action to write off any part or portion of the loans and discounts carried upon the books of the bank, believing that they are good and collectible, is not a guarantor of the collection of such loans and discounts, and would not be liable to any person in damages, though it should afterward turn out that he was mistaken in believing that they were good and collectible, from the fact that they afterward in fact turned out to be bad and uncollectible.

If you believe from the evidence in this case that the defendants in February, April, June, September, and November of the year 1903, then believed that the paper then in the bank discounted by the Maltby Lumber Company would be paid either through the drafts or through the securities before that time given to the bank by the Maltby Lumber Company, and the Maltbys, and that no loss would be suffered to the bank through such paper, then I charge you that the plaintiff is not entitled to recover in this case, and you would have no right to consider the testimony given in the case showing or tending to show that losses did occur and were written off by the bank in the year 1905.

The duty to write off worthless assets is the duty of the board as a whole, but if this duty is not performed by the board an individual director, who is engaged generally in the performance of his functions, may be individually liable because of his participation in such failure to act. The duty to charge off bad paper is not an absolute one arising definitely as to each piece of paper the moment before collection becomes impossible; there must be a reasonable margin of honest discretion as to the amount of paper which the board may carry after it has become presently uncollectible. There must, also, be a reasonable time for consideration after a debtor has become unable to pay, and the directors know his paper is in a strict sense then worthless. How much if any of this paper should be still carried as an asset and for how long will depend upon his moral character, his prospects for recouping his loss and
436 other like considerations. Here again an honest discretion must be used. The only general rule that can be given is that the duty to charge off arises when and so far as the directors know that they are carrying uncollectible paper beyond that reasonable amount and that reasonable time permitted by an honest exercise of their official discretion. In other words, it arises when they know that longer carrying will, through the regular reports

or otherwise, normally result in substantially misleading the public as to the net value of the bank's assets.

The duty to charge off depends in this case not only upon the question whether the railroad and telegraph companies actually owed Mrs. Maltby, but, also, on the question whether Mrs. Maltby or her husband could be compelled to or voluntarily would make the bank good.

Plaintiff claims that the facts in this case show that the defendants did actually assent to and permit the carrying of the Maltby paper when they knew that a large portion of it could not be collected either from the railroad companies or Maltby, and that they carried it in an unreasonable amount and for an unreasonable time when they knew that the public would be deceived by their failure to charge it off from the published resources of the bank.

On the other hand defendants claim that they honestly and in good faith believed that the Maltby line was secured and was reasonably good and was a legitimate and proper asset of the bank.

Knowledge of the falsity of a report or the untrue statement contained therein must have been known to the defendants at the time they signed the report, and you would have no right to find a verdict against the defendants or either of them for and on account of any knowledge or information that they might have obtained after the publication of the report, and which came to them subsequent to its publication, and was not known to them at the time that the report was signed by them or either of them.

You can not impute to these defendants knowledge of the affairs of the bank and of the Maltby claim simply because they are directors. The knowledge to which I shall refer in this charge as being necessary to hold them liable must be actual knowledge.

Defendants are not liable simply, because there was paper in loans and discounts that turned out at a later time to be bad or uncollectible. Their honest belief as to the value of such paper when the reports were made is the material inquiry.

437 No recovery can be had in this case, because of any violation of the law limiting the amount which can be loaned under the banking law by national banks to one individual.

These defendants cannot be held liable because of their own bad management or negligence, or the bad management or negligence of any other director, officer or employe of the bank, nor because they did not give more of their time to the affairs of the bank, nor because they committed the actual management of the bank to others, nor for any mistake in judgment, nor misconduct of any kind or description on the part of any other person than themselves. I might continue at length telling of things for which defendants cannot be held liable, but I will cover them all by saying to you that they cannot be held liable in this case, except for the particular things and in the particular ways I shall later specifically point out to you.

The testimony in regard to dividends may be considered by you only in connection with the tenth count, and plaintiff is not entitled

to a verdict even under the tenth count because of the dividends alone.

If you find from the evidence that the defendants believed that the Maltby Lumber Company paper was collectible and would be paid, that they had a right to declare and pay the dividends paid by the bank in the year 1903, which are complained of by the plaintiff in this case, under such circumstances the payment of the dividends would constitute no evidence showing or tending to show liability on the defendants in this case or either of them on account of the claimed losses suffered by the plaintiff through his purchase of the capital stock of said bank.

It is not necessary for the plaintiff to prove any actual conscious design or intention on the part of the defendants to mislead or deceive the plaintiff.

No witness would be permitted to testify that another person had certain knowledge or intent or was guilty of fraud, and it is competent to prove knowledge, intent or fraud by the evidence of facts and circumstances. In deciding what the defendants knew you may consider their conduct and observe what was said by or to them, and the facts which came to their attention and knowledge. Their mere denial of knowledge is not conclusive, but you should consider their denials with all the other evidence in the case, and draw your own conclusions from all the facts in the case as to what they knew and believed at the time in question. If you find that any particular fact came to the knowledge of one defendant you are not to consider it as against the other defendant, but so far as the facts properly apply to each defendant, you have a right to consider
438 such facts and circumstances as bear on the question whether defendants knew what it is claimed they knew in the year 1902, and 1903, at the particular time, in those years, alleged in the counts of the declaration submitted to you.

If the situation and condition of the bank was reported to Judge Chester L. Collins, the then attorney for the bank in 1903, and such attorney advised the board of directors that they should declare and pay a dividend to the stockholders, and the directors of the bank were acting in good faith, they had a right to rely upon the advice of their attorney and order said dividend paid, and no liability would attach to those defendants or either of them on account of the payment of such dividend, although loss were sustained by the plaintiff through such payment. The defendants cannot excuse a knowing violation of the statute by claiming that they relied upon the advice or custom of another director or officer or the attorney of the bank.

The reports counted upon extend over a period of time from February 6th to November 17th, 1903, and defendants' knowledge and information may have been less, greater or different regarding the Maltby account at different times. You might find liability on one count and no liability on another, all depending on what you honestly believe and find from the evidence under the instructions which I give you.

The question of the manner in which the bank disposed of the Maltby assets is important only, as it may throw light on the actual value of the Maltby paper at the particular dates, in 1902 and 1903.

In determining whether defendants were acting honestly or dishonestly anything which indicates that they had a motive is material. The testimony in regard to sales of stock by the defendants may be considered by you for whatever weight you think it is entitled to as bearing upon this branch of the case, and you may consider those sales of stock with the explanation of the defendants as to why they sold their stock, and all the other evidence in coming to a conclusion in regard to the defendants' knowledge and intent.

It appears from the evidence that the plaintiff, Woodworth in January, 1905, as a director of the bank signed a report to the comptroller of the currency, similar to the one signed by the defendants in this case, and that included in said report signed by the plaintiff as a director, was included all of the Maltby paper at its face value, and you have a right to consider this report as evidence tending to show that the plaintiff then believed the Maltby Lumber Company line of credit to be good, and that no loss would be sustained
439 thereby, and this evidence may be considered by you as evidence tending to show the good faith of the defendant in signing the reports of 1903.

The plaintiff, Woodworth, in May, 1905, signed the report to the comptroller of the currency as a director of the bank, which report included something like \$88,000.00 of the Maltby Lumber Company paper reported in loans and discounts as good, and you have a right to consider that report as evidence tending to show that the plaintiff, Woodworth, at the time considered this \$88,000.00 of the Maltby Lumber Company's paper as good, and as evidence tending to show that the defendants believed the paper to be good when they signed the report in the year 1903, now complained of by the plaintiff in this case.

Plaintiff in his testimony stated his reason and explanation for signing these reports, and you have a right to consider his testimony on that subject in connection with all the other facts and circumstances shown bearing on that phase of the matter. If you should conclude that the plaintiff when he signed the reports in 1905 knew as much about the Maltby paper as defendants did in 1903, you might then have a right to consider his action as an admission that the paper not then charged off was not so plainly worthless as to require an immediate writing off by the board in 1903.

The mere fact that plaintiff signed the 1905 reports or either of them does not prevent his recovery and does not excuse the defendants if they are otherwise liable.

It makes no difference in this case why plaintiff bought his stock, if in making the purchase he relied upon the published reports in paying the price that he did. It is not necessary for plaintiff to show that he relied wholly or solely on the published reports. It is sufficient if that materially influenced him in buying the stock and

paying the price that he did, even though he was, also, influenced partially by other matters.

If you find from the evidence in this case that the plaintiff did not rely upon the published reports of this bank in making the purchase of stock, but had or sought and obtained independent information regarding the bank's condition, upon which he did rely in making said purchase, then you would have no right to find a verdict in favor of the plaintiff in this case against the defendants, or either of them, and your verdict should be in favor of the defendants, no cause of action.

Plaintiff was asked certain questions on cross-examination to the effect that he was negligent, or that he might have made further inquiries before buying the stock. These facts, even if true, do not prevent his recovery in this case. If he relied upon the published reports it makes no difference whether he did or did not make
440 additional investigation. His negligence, if any, is not a defense in an action of this kind. And defendants, if they knowingly permitted the publication of a false report, cannot complain because plaintiff had confidence in it and relied upon it.

It is not necessary for plaintiff to show that defendants actually derived any benefit from the claimed violation of the statute. Plaintiff's right to recover, if any, depends upon his loss, not upon their gain.

If the defendants knowingly violated the statute as alleged, the fact that others acted with them or performed similar acts whether knowingly or otherwise does not relieve defendants from liability.

You are not concerned in this case with what Mr. Andrews knew or believed or what any of the directors knew or believed except the defendants themselves. If defendants acted knowingly and in bad faith as claimed by plaintiff, they cannot excuse themselves by arguing that Mr. Andrews or the other directors acted in good faith. On the other hand, if defendants acted in good faith, they can not be held liable, because of the misconduct, if there was misconduct, on the part of Mr. Andrews or anyone else except on their own part.

Plaintiff was not compelled to sue all of the directors who signed the reports or who served during the years complained of, but he had a right to select the two defendants and to sue them alone if he desired.

The measure of plaintiff's damages, if you find a verdict for the plaintiff, is the difference between the fair market value of the stock purchased if all of the Maltby paper had been of a character entitling the directors to report it as assets, and that sum which would have been its fair market value if the defendants had written off and had not reported as assets so much of the Maltby paper as it may have been their duty to write off under the rules already declared. To this should be added interest, at five per cent, from the date of each purchase to the date of your verdict.

I have already told you that the liability of the defendants is limited by the plaintiff's proportionate share of the amount of the

Maltby loan known by the defendants to be bad at the time the reports were made, in 1903, and how it is so limited.

If you should find for the plaintiff and against both defendants, but should find that the knowledge of the defendants in this regard was different, and that under the instructions already given you that plaintiff was entitled to recover less from one defendant than from the other, then you must return a verdict against both defendants for such lesser amount, and for no more.

441 In this case, plaintiff does not claim that the defendants knew that the Maltby loss was the exact amount which afterwards developed. You could not on any logical basis or intelligent theory reach the conclusion that the defendants in 1903 knew that the Maltby loss was the exact amount which did develop after years of liquidation. Common experience shows that losses in such a case develop and increase in liquidation beyond the amount first expected. You must base your findings upon the evidence and not upon conjecture or speculation.

Plaintiff claims that the defendants at all times during the year 1903 knew that there would be a very large shrinkage of these assets in the course of liquidation, that making all allowances for errors in judgment and allowing a reasonable margin of time and amount, defendants at all times during the year 1903 knew that they could not realize enough on the Maltby assets over and above the expenses of collection to reduce the Maltby loss below \$200,000.00. And that at all times during the year 1903 the defendants knew that the loss would be \$200,000.00 or more. That, therefore, plaintiff is entitled to recover his proportion of the sum of \$200,000.00 which he claims to be the difference between the fair market value of the entire capital stock of the bank if all the Maltby paper had been of a character entitling the directors to report it as assets, and that sum which would have been its fair market value if the defendants had written off so much of the Maltby paper as it was their duty to write off.

If you find that plaintiff is correct in these claims and in the amount claimed the measure of his damages would be as follows: For his first purchase, which was a purchase of 20 shares, or one per cent. of the capital stock of the bank, his damages would be one per cent. of the \$200,000.00 or \$2,000.00, with interest from March 14th, 1903 to the date of your verdict, at five per cent. which is claimed to be \$975.56, making a total claim for his first purchase of \$2,975.56. For his second purchase, which was a purchase of 25 shares, or $1\frac{1}{4}$ per cent. of the capital stock of the bank, he would be entitled to recover $1\frac{1}{4}$ per cent. of \$200,000.00 or \$2,500.00, together with interest at five per cent. from May 26, 1903, to the date of your verdict, which is claimed to be \$1,194.45, making a total claim for the second purchase of \$3,694.45. For the third purchase, which was a purchase of 30 shares, or $1\frac{1}{2}$ per cent. of the capital stock of the bank, he would be entitled to recover $1\frac{1}{2}$ per cent. of \$200,000.00 or \$3,000.00, together with interest at five per cent. from September 16, 1903, which is claimed to be the sum of \$1,387.50, making a total claim for the third purchase of \$4,387.50.

For the fourth purchase, which was a purchase of eighty shares, or four per cent. of the capital stock of the bank, his damages
442 would be four per cent. of \$200,000.00 or \$8,000.00, with interest at five per cent. from December 16, 1903, which is claimed to amount to \$3,600.00 making a claimed total for the fourth purchase of \$11,600. The total sum so claimed would, therefore, be as follows: For the first purchase with interest—\$2,975.56; for the second purchase with interest,—\$3,694.45; for the third purchase with interest,—\$4,387.50; for the fourth purchase with interest,—\$11,600.00; making the total amount with interest, \$22,657.51.

If you should find that the amount of known bad paper to be used as a basis for your verdict was less than the sum of \$200,000.00—your verdict should be proportioned accordingly.”

In any case, you should not give a verdict on any of his purchases for more than the amount so claimed by him on that purchase.

By stating to you what part is claimed, I do not want to be understood, and you must not infer that I am making any intimation as to whether their claim is right or wrong in all or any part or element of such claim.

Plaintiff claims that the defendant knew that \$200,000 had been lost to the bank and should have been charged off to profit and loss at the time the reports were made in 1903. There is nothing in the testimony fixing that as the particular and exact amount. It is entirely proper for plaintiff to state definitely what he claims, but you must not find for the amount that plaintiff claims or for any other amount, unless you so find by a preponderance of the evidence and under the instructions which I have given you. You should not and must not find the amount for which plaintiff makes claim simply because this is all figured out for you, or for any other reason, except you find it, because it is your honest judgment under all of the evidence, and under the law as I have given it to you. I speak of the amount for which plaintiff claims simply as fixing the limit beyond which you cannot go, and leave it entirely to your own good judgment on the evidence, and under the law what amount, if any, you are to find.

Now, without retracting a word or changing or altering in any respect a single statement which I have already made to you relative to the law, but simply for the purpose of simplifying, I shall briefly review and point out to you three important, distinct, and separate allegations made by the plaintiff, each one of which is denied by the defendants, which are questions of fact.

The burden of proof is upon the plaintiff to establish each and all of these three certain issues of fact, and every element of his case by a preponderance of the evidence, which simply means the
443 greater weight of the evidence. These three issues of fact are as follows: First. Was a substantial amount of this Maltby claim uncollectible and bad, and should a substantial portion of it have been charged off to profit and loss by the Board of Directors at the time or previous to these certain published reports of the bank in 1903? Second. If you find that a substantial portion of the

Maltby claim was at that time bad, and should have then been charged to profit and loss by the Board of Directors, did these defendants know it at that time? Third. If you find that a substantial portion of this Maltby claim was then bad and that it should have been then charged off to profit and loss, and that these defendants knew it at that time, did the plaintiff rely upon and was the plaintiff deceived by these published reports and thereby induced to purchase stock and pay the price therefor he did?

Unless you answer all three of these questions in the affirmative, and in favor of the plaintiff, your verdict must be in favor of the defendants, no cause of action. If you find all three of these questions in favor of the plaintiff, you then come to the question of damages, and will follow the instructions I have given you on that subject.

On many occasions in this charge I have referred to the defendants collectively. As to the question of what they knew about this transaction and what they thought and believed to be their duty and believed and thought ought to be done with reference to charging off a substantial portion of the Maltby claim to profit and loss at the time or previous to these certain reports in 1903, and what they then knew, thought and believed about their right to make the three dividends referred to under the tenth count, you must consider these defendants entirely separately. Knowledge on the part of one does not mean knowledge on the part of the other. You might find that they both knew, thought and believed the same thing, or you might find that they did not. If you find in favor of the plaintiff and against both defendants, you will so state and name the amount which you find for the plaintiff in one lump sum. If you find for the plaintiff as against one defendant, and in favor of the other defendant, you will so state in your verdict and name the amount in one lump sum, which you find against the one defendant, and render a verdict of no cause of action as to the other defendant. If you find in favor of both defendants, your verdict will be no cause of action.

Mr. T. A. E. Weadock: I will take my exceptions in the presence of the jury.

The Court: Yes, I think that is the rule.

444 Mr. T. A. E. Weadock: That the reports are not alone for the directors. This could only apply to the published report. To the portion of the charge beginning that the defendants are not excused by good faith; to the charge with reference to the declaration.

To the charge beginning, part of the general design to deceive the public. To the charge on the questions relating to the reports. To the charge that the plaintiff was not required to prove directors signed their names. To the charge beginning, the underlying fault was to write off. To the charge, if defendants knew, and in my memory they did, etc. To the charge beginning, charge off assets that had become worthless, it was the duty of the board, etc. No exception is taken to that particular part, but to what follows it. To the charge

beginning, it is not necessary to prove a conscious-design to defraud. To the charge that the statements signed by the plaintiff in January and May, 1905, did not prevent him from maintaining the suit. To the charge that plaintiff is not prevented from recovery by his negligence. To the charge that plaintiff's right to recover depends on his loss. To the charge that defendants are not concerned with what Mr. Andrews knew or believed. To the charge that plaintiff was not compelled to sue all of the directors. To the charge that there is a difference between fair market value if the Maltby paper was good, and the value at which that paper should have been charged off. To the charge with reference to the \$200,000.00 as the amount of loss. To the charge that any evidence in the case could be considered after the date of Nov. 17th, 1903, the date of the last report.

The jury thereupon retired, and after being absent for a time, returned into court and rendered a verdict against the defendants, on December 19th, 1912, for the sum of Twenty-two Thousand, Six Hundred Sixty-two and 98/100 (\$22,662.98) Dollars.

On November 22nd, A. D. 1913, judgment was duly entered in favor of said plaintiff, and against the defendants for the amount of said verdict, with interest thereon at five per cent. from the date of its rendition to the date of said judgment, amounting to Twenty-three Thousand, Seven Hundred Fourteen (\$23,714.00) Dollars.

And now, in furtherance of justice and that right may be done, the defendants, Joseph W. McGraw and Frank P. Chesbrough, within the time allowed by the court for that purpose, tender and present the foregoing as their bill of exceptions in this case to the action of the court, and pray that the same may be settled and allowed and signed and sealed by the court and made a part 445 of the record, and the same is accordingly done this 9th day of February, A. D., 1914.

The foregoing contains all the testimony in the case in narrative form, and where the testimony herein is set forth in the form of question and answer, it was so set forth that the evidence might be clearly understood.

ARTHUR J. TUTTLE,

District Judge.

O. K.

THOMAS A. E. WEADOCK,

GILLETT & CLARK,

By E. S. CLARK.

Filed February 9th, 1914.

Verdict.

(Entered Dec. 19, 1912.)

The jurors heretofore empanelled and sworn in this cause come into court again and sit together, and after hearing the evidence in the case, the arguments of counsel and the charge of the court, retire under the charge of officers duly sworn for that purpose to consider

of their verdict to be given, and after being absent for a time, come into court again, and after being each duly polled, say upon their oaths that the said defendants are guilty in manner and form as the said plaintiff hath in his declaration complained against them, and they assess the damages of the said plaintiff on the occasion of the premises at the sum of Twenty-two Thousand Six Hundred and Sixty-two Dollars and Ninety-eight Cents (\$22,662.98).

On application of Mr. T. A. E. Weadock, attorney for the defendants, it is ordered that the time within which to move for a new trial herein, be and the same is hereby extended for a period of forty days from and including this date.

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Judgment.

(Entered Nov. 22, 1913.)

The jurors by whom the issue in this cause was tried, having on the nineteenth day of December, A. D. 1912, found a verdict in favor of said plaintiff and against both said defendants, in the sum of Twenty-two Thousand Six Hundred Sixty-two dollars and Ninety-eight Cents (\$22,662.98), now on motion of Messrs. Gillett and Clark, attorneys for said plaintiff, it is by the court now here considered that the said plaintiff do recover against the said defendants the damages assessed by the jurors aforesaid with interest thereon from the date of the rendition of the verdict, to-wit, One Thousand Fifty-one Dollars and Two Cents (\$1,051.02) said damages and interest together amounting to Twenty-three Thousand Seven Hundred and Fourteen Dollars (\$23,714) together with his costs and charges by him about his suit in this behalf expended to be taxed, and that said plaintiff have execution therefor.

Order of Severance.

(Entered Nov. 22, 1913.)

In this cause defendant McGraw having signified by writing now on file, that he does not desire to take or join in an appeal, and it having been shown to the court that defendant Chesbrough is desirous of suing out a writ of error herein, it is therefore ordered by the court that there be a severance as to the said two defendants, and that defendant Chesbrough be and he hereby is allowed to petition for writ of error in his separate capacity.

449

Assignment of Errors.

(Filed January 30, 1914.)

The defendant, Frank P. Chesbrough, in this action, in connection with his petition for writ of error, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to-wit:

1. The court erred in overruling the demurrer to the plaintiff's declaration in this cause, and in holding that said declaration stated the cause of action against this defendant,—the demurrer being set forth in full in the record.

2. The court erred in admitting any evidence under said declaration, for the reason that in none of said counts is any charge made against the board of directors of the Old Second National Bank, nor is it alleged that they knowingly violated or assented to any violation by the officers, agents or servants of said bank of any of the provisions of the National Banking Act; plaintiff having based his right to recover on alleged violations of section 5239 of said statutes.

450 3rd. Because prejudicial error to the defendant was committed by the court in allowing evidence of the payment of dividends under plaintiff's declaration. The advice of counsel of said bank that said dividends were due and payable being ample justification for the board of directors, and the individual members thereof acting in good faith in the payment of said dividends.

4th. The court erred in admitting in evidence the proceedings of the directors' meetings, when neither of said defendants was present, and when only one of them was present; the record showing for the years 1902 and 1903 that at many of these meetings neither of the defendants were present, and at others only one of the defendants was present and evidence against one would not be admissible against the other.

5th. The court erred in admitting in evidence letters of the comptroller of the currency, being exhibits 24, 25, 26, 27 and 28, because the same were not competent as against the defendant Chesbrough, never having been brought to his attention.

6th. The court erred in receiving in evidence the comptroller's letter of October 24th, 1902, either as notice to defendant, or for any other purpose.

7th. The court erred in receiving in evidence letters marked Exhibits 29 and 30, because said letters were incompetent, irrelevant and immaterial; they were not properly proven so as to entitle them to admission, and it was not shown that said letters, or either of them was ever brought to the notice of the defendant, Chesbrough, or either defendant, prior to the publication of the reports complained of in the declaration.

8th. The court erred in receiving in evidence the minutes of the meetings of the board of directors of January 3rd, 1902, because no quorum was present at that meeting. Mr. Chesbrough was not there, and it was incompetent under the declaration, because the directors could only act as a board, and liability could only be based on the action by the board, under section 5239 of the revised statutes.

9th. The court erred in refusing to permit the defendant to show by the witness, Frederick P. Browne, cashier of First National Bank of Bay City, and the cashiers and directors of the banks in Bay City, that it was the usual custom of directors to sign reports of the condition of the banks, relying upon the sworn statement of the officers of the respective banks who were honest men, that the statements were correct.

451 10th. The court erred in admitting in evidence the minutes of the directors' meeting of May 31st, 1902, in reference to declaring a five per cent. dividend out of the earnings of the past six months, which was admitted over defendant's objection that it was incompetent, irrelevant, and immaterial, because defendant Chesbrough was not present, and evidence as to dividends was incompetent under the declaration.

11th. The court erred in receiving in evidence the minutes of the directors' meeting of June 6th, November 14 and 28th, 1902; at neither of which meetings was defendant Chesbrough present.

12th. The court erred in receiving in evidence the letters from and to the Old Second National Bank to various parties being Exhibits 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 and 47, for the reason that they were incompetent and immaterial as to the questions at issue in this case, and were never brought to the notice of the defendant, which letters were objected to for the foregoing reasons when presented by the witness, Andrews, who was asked the question—"what, if any, action did you take to bring these letters before the board?" A. "I thought they were present at the board meeting. I won't be sure about that; but they were considered by the executive officers of the bank."

13th. The court erred in receiving in evidence tabulations, lists and amounts prepared from time to time in the bank, and by the accountant, who afterwards made an examination of the books and papers in the bank, all of which were duly and seasonably objected to on the trial, for the reason that it had not been shown that any of these amounts or transactions had ever been brought to the attention of the defendants, or either of them, prior to this suit.

14th. The court erred in receiving in evidence the report of February 6th, 1903, for the reason that that report was attested to by Joseph W. McGraw, A. J. Cook, and James E. Davidson, and was not the report set out in the declaration, and was not signed by defendant Chesbrough.

15th. The court erred in receiving in evidence the report of Feb. 6th, 1903, and in refusing to strike out said report on motion of defendants' counsel.

16th. The court erred in refusing to strike out the report of Feb. 6th, 1903, as published in the Bay City Tribune on October 14th, 1903.

17th. The court erred in receiving in evidence the same report printed in the same paper on October 15th, and also, on October 13th, being plaintiff's exhibits 2, 3 and 4.

18th. The court erred in receiving in evidence the report of the Old Second National Bank as of April 9th, 1903, as published in the Bay City Tribune April 14th, 15th and 16th.

19th. The court erred in receiving in evidence the report of the Old Second National Bank at the close of business on June 9th, 1903, printed in said Tribune on June 13th, 1903, and the same report printed on the 14th and 15 of June, 1903, being Plaintiff's Exhibits 10, 11 and 12.

20th. The court erred in permitting plaintiff's counsel to state

to the jury that at the time the report of June 9th was made, there were \$220,000.00 of the Maltby indebtedness not charged off, and this, with the knowledge of both defendants that such report would be published from the books of the bank.

21st. The court erred in receiving in evidence the report of September 9th, 1903, and the various publications of said report in the Bay City Tribune.

22nd. The court erred in permitting the witness, Woodworth, to state, in reference to plaintiff's exhibit 14, that at the time of making the purchase, he relied upon the statement published in the Tribune of that morning, and had no other knowledge of the then condition of the Old Second National Bank.

23rd. The court erred in admitting in evidence the report of November 17th, 1903, and the various publications thereof in the Bay City Tribune.

24th. The court erred in permitting plaintiff, a witness in his own behalf, to answer the question as to whether he relied solely upon the last named statement, or anything else, or any other information in making his purchases of bank stock.

25th. The court erred in holding that the real liability of the defendants was based upon the fact that paper in the bank had not been charged to profit and loss, and withdrawn from the live assets of the bank, when proof of such a statement was not competent under the declaration in this case, and neither of the defendants, nor both of them together could have charged off any paper, as they were not a majority of the board of directors, and never at any time prior to the commencement of this suit opposed charging off this paper from the live assets of the bank.

453 26th. The court erred in receiving any testimony in reference to the condition of the bank, or proceeds received by the bank from the securities turned over to it by Maltby after the date of November 17th, 1903.

27th. The court erred in permitting plaintiff to answer the—

“Q. Will you say what you meant by saying it did not make any difference to you?”

Which the witness answered—

“It did not make any difference to me which three of the bank, signed the statement. I knew all the directors personally, and all were reputable men.”

28th. The court erred in permitting the plaintiff to answer the—

“Q. Why was not more of the paper charged off at that time, in January?”

“A. The reason they did not charge off any more was, because they did not have surplus enough to do that.”

Also, in permitting said plaintiff to answer the—

“Q. Was this Maltby paper that was in the bank, at the time you made this statement, and signed it in May, 1905 (29th), within a short time afterwards, charged off to profit and loss?”

Which the plaintiff answered—

“A. It was charged off at different times, as the bank earned

enough to do it with any small amount, until, I think, it was entirely wiped out, the other \$100,000."

Also, in allowing the plaintiff to answer the—

"Q. Now, I will return to the items of that \$300,000.00, which you say was wiped out?"

And in permitting the—

"A. The capital stock had been reduced \$100,000.00—\$135,000.00 of Maltby Cedar Company paper was charged off, and also, the Brotherton matter in the neighborhood of \$73,000.00, making it practically \$300,000.00."

29th. The court erred in admitting evidence of the fact that Mr. McGraw was not elected a director in 1905, because it was immaterial.

30th. The court erred in receiving in evidence Exhibit 21, containing all the requests of the comptroller of the currency for reports of the Old Second National Bank.

31st. The court erred in requiring the witness, Andrews, to answer the following—

"Q. Coming back to the years before 1903, how long had this been the established practice of the bank to make up reports by this method, namely, the directors signing two copies each of the same report."

454 32nd. The court erred in requiring the witness, Andrews, to answer the—

"Q. What do you say as to whether all the directors of the bank understood and were acquainted with this practice?"

This was objected to, as incompetent and leading. The objection was overruled, and the witness answered.

"I suppose they were informed about it in a general way."

Also, in requiring the said witness to answer the—

"Q. To the best of your knowledge and belief, will you state what objection, if any, any of them ever made to that method?"

Which question was objected to by defendant's counsel as immaterial and incompetent. The objection was overruled, and the witness answered.—

"I can not recall now, they may have done so."

Also, in requiring said witness to answer the—

"Q. Taking up the five reports of 1903, that were published, state whether or not, they all included, among the loans and discounts, the entire line of the Maltby Lumber Company paper?"

This was objected to as incompetent, and not the best evidence. The objection was overruled, and the witness answered.—

"In 1903, I believe they were all carried as assets and all at their face value."

Also, in requiring the said witness to answer the—

"Q. Have you here the profit and loss account, showing when the first amount was charged off, from the Maltby Lumber Company paper?"

This was objected to as being after November, 1903, and objected to as incompetent, for the reason it was nearly two years later; Mr.

McGraw was not there at that time, -either was Mr. Chesbrough. The court overruled the objections and admitted the testimony.

33rd. The court erred in admitting in evidence the entry in the profit and loss account of the Old Second National Bank made February 20th, 1905, as follows: Maltby Cedar Company (successors of Maltby Lumber Company) \$135,000.00.

This was objected to as incompetent, as occurring after the date of November 17th, 1903,—defendant McGraw not being then a director of the bank.

Also, in requiring said witness to answer the—

“Q. And, now, will you state the entire amount of the Maltby paper that was finally charged off to profit and loss, and show it by the books of the bank?”

455 Defendant's counsel objected to this; which objection was overruled, and the witness answered,—

“This book shows \$155,000.00.”

34th. The court erred in admitting in evidence Exhibit 22, articles 4, 5, 11 and 14 of the by-laws of the bank, which was objected to as incompetent. The objection was overruled, and the by-laws admitted.

35th. The court erred in admitting in evidence the daily statement described in article 14 of the by-laws, there being no claim that the directors actually saw it.

The objection was overruled, and the evidence admitted.

36th. The court erred in permitting the following question, in connection with the Mosher failure which had happened some years before 1903.

“Q. Did the bank suffer a loss through his paper?”

This was objected to as immaterial. The objection overruled, and the witness answered,—

“Yes, there was a loss on his claim. I don't remember now what year it was.”

37th. The court erred in requiring the witness, Andrews, to answer the following question referring to Alzina Maltby doing business as the Maltby Lumber Company.

“Q. I ask you to refresh your memory from the testimony given on the other trial, as to whether or not this company had any commercial rating?”

Objected to as not the best evidence. Objection overruled, and the witness answered—

“I am not sure of that. It was not financially strong, but safe for the business he asked for. I don't know as they had any commercial rating, nor do I recall what their capital was at that time.”

38th. The court erred in admitting in evidence Exhibit 24, letter of the comptroller of the currency to Mr. Orrin Bump; also, Exhibits 25 and 26 being letters relating to the same matter.

39th. The court erred in receiving in evidence Exhibit 28, which was objected to by defendants' counsel as incompetent and immaterial, simply referring to the statutes of the United States, and it was not brought to the attention of either defendant.

40th. The court erred in receiving in evidence Exhibits 29 to 39 inclusive, being correspondence between the cashier of the bank with

third parties, and not shown to have been brought to the attention of defendants or either of them.

456 41st. The court erred in admitting the testimony of the witness, Fisher, as against the defendant, McGraw, relating to a conversation Mr. Fisher claimed to have had with Mr. Chesbrough, in reference to the stock of the Second National Bank.

42nd. The court erred in refusing to permit the witness Fisher to answer the—

"Q. Do you know that Mr. Bump has been regarded as a very competent banker in this locality?"

To which plaintiff's counsel objected, and the answer was excluded.

43rd. The court erred in requiring the witness, James M. Lewis, to answer the—

"Q. To what extent was your connection with the bank kept secret, if at all?"

Which was objected to as incompetent and leading. The court overruled the objection, and the witness answered,—

"It was supposed to be a secret to everybody, except Mr. Maltby and his son. The other clerks were not supposed to know I was there for anything more than a hired clerk in the office. My duties were to look after the finances, open the mail, and take care of the bank account."

44th. The court erred in requiring the witness, Lewis, to answer the—

"Q. When was the Maltby Cedar Company organized?"

Which was objected to as incompetent, not the best evidence. The objection was overruled, and the witness answered—

"In July, 1904."

45th. The court erred in requiring the witness, Lewis, to answer the—

"Q. Were there ever any cases, where your stock of personal property, poles or ties, became so broken that there were not enough to sell advantageously? What did you do in cases of that kind so long as the business was active?"

Objected to as leading. Objection overruled, and the witness answered,—

"Tried to replenish them, so as to sell the old. During that time, there was some new business."

46th. The court erred in requiring the witness, Lewis, to answer the—

"Q. How fast did you push the sales of the Maltby Lumber Company?"

457 This was objected to as leading. The objection was overruled, and the witness answered—

"We pushed it as fast as we could to close out the business in the proper way. There are some matters yet that are not closed up."

47th. The court erred in admitting the line of testimony shown by the following—

"Q. State to what extent, if any, your experience in this business,

enabled you to judge the value of the property? Answer it if you can?"

This was objected to as incompetent. The court overruling the objection, and the witness answered—

"I think I was competent. I do not think I could have sold the assets to any better advantage by selling them more rapidly."

48th. The court erred in permitting the witness, Lewis, to answer the—

"Q. What can you say as to whether the amount realized from the assets represented, their full value to the bank, in your opinion, that is what you got out of them?"

This was objected to as incompetent, defendant excepted, and the witness answered—

"They represented their full value to the bank."

49th. The court erred in requiring the witness, Lewis, to answer the—

"Q. If on October 31st, 1902, Mr. Maltby had poles and ties in his various yards, what was the condition of the market if you know, as to whether those could or could not be sold? Whether they were quick assets or otherwise, if they were there?"

This was objected to as incompetent, which objection was overruled, and the witness answered—

"I don't recall the state of the market at the time. I do not recall enough of this inventory to remember what I discovered, whether I discovered anything about it afterwards, as to its correctness in any way."

50th. The court erred in requiring the witness to answer the—

"Q. Describe the manner in which the record of land was kept in the Maltby office?"

This was objected to as being incompetent, the record being the best evidence. The objection was overruled, and the witness answered—

"They had a regular land book, and there was a clerk in the office which we always called the land clerk, who always handled all the land records."

458 51st. The court erred in requiring the witness, Lewis, to answer the—

"Q. Did you afterwards learn anything about the condition of the titles of Maltby's lands?"

This was objected to as being incompetent. The objection was overruled, and the witness answered—

"We afterwards discovered that a great many of the titles were very poor, in fact, nothing but tax titles. A great deal of the taxes had never been paid for many years."

Also, the—

"Q. What was the market for cedar swamp lands at that time, with the lumber off?"

Objected to as incompetent. He did not buy or sell, and does not know anything about it. Objection is overruled, and the witness answered—

"I can not say."

Also, in requiring the said witness to answer the—

"Q. State whether or not, you had difficulty in disposing of
 dar swamp lands, without timber?"

This was objected to as immaterial. Objection overruled, and
 the witness answered—

"I can not recall that there had been any particular difficulty
 in selling any more than that possibly, I thought when we made
 the sales. I understand that the directors of the bank had the
 land appraised."

Which answer defendants' counsel moved to strike out—which
 motion was denied.

52nd. The court erred in admitting evidence of defendant Mc-
 Graw's lists of stock as against the defendant Chesbrough.

53rd. The court erred in sustaining the plaintiff's objection to
 the question by defendant's counsel attempting to show that the di-
 rectors of the First National Bank of Bay City were attempting to
 get hold of the stock of the Old Second National Bank, which ob-
 jection was sustained, and the testimony was excluded.

54th. The court erred in not permitting defendant to show by
 the plaintiff, on cross examination, the effort to acquire control of
 the Old Second National Bank by parties interested in the First
 National Bank.

55th. The court erred in sustaining plaintiff's objection to the
 defendant's question, with reference to E. B. Foss, one of the di-
 rectors of the bank, namely—

"Q. And he is a thoroughly, honorable, and competent business
 man in this community?"

459 The court sustained the objection, and excluded the testi-
 mony.

56th. The court erred in allowing the following question to be
 asked of witness, Clift.—

"Q. Take the Godkin stock that was sold, state whether or not
 you had the certificates for that stock?"

Objected to as immaterial, irrelevant and incompetent in this
 case. Objection is overruled, and the witness answered,—

"I did."

57th. The court erred in permitting plaintiff to offer in evidence,
 the stock account of J. W. McGraw on the stock ledger of the bank
 over defendant's objection that it was incompetent and immaterial.

58th. The court erred in receiving in evidence, the account of
 Jennie McGraw Curtis, in the stock ledger of the bank, sister of the
 defendant, J. W. McGraw; the account of defendant, Frank P.
 Chesbrough, Exhibit 152; also, the account of Aaron Chesbrough,
 Exhibit 153. The court overruled the objection, and admitted the
 testimony.

59th. The court erred in requiring the witness, A. W. Clark, to
 answer the—

"Q. What was the bill of particulars supposed to show so far as
 the Maltby items are concerned?"

Defendants' counsel objected to any items in the bank after the
 17th of November, 1903.

The court overruled the objection, and admitted the testimony.

60th. The court erred in admitting in evidence Exhibit 154, being charts prepared by the witness, Clark, which was objected to as immaterial and incompetent, never brought to the attention of either of the defendants, and seeking to charge defendants with information contained in it. It has no bearing on the issue in the case.

The court held the record was voluminous, and counsel for defendants replied that the record might be voluminous, but the point is that the directors are not chargeable by what is disclosed by the books of the bank.

The objection was overruled, and the testimony admitted.

Same objections and ruling was made as to Exhibits 155, 156, 157, 158, 159, 160, 161 and 162; same objection being made to each. They were incomplete, showing simply the date and amount of different papers; they had no reference to the bills of lading, nor inspection certificates, nor assignments of the accounts to the bank.

They were partial, one sided, self-serving statements, and 460 insofar as the figures were repeated, they were incompetent as being already in evidence. All of which objections the court overruled, and admitted the testimony.

61st. The court erred in refusing defendant's motion to strike out Exhibits 154 to 160 inclusive, as not being the best evidence, which motion was denied.

62nd. The court erred in receiving in evidence daily statements of the bank of the dates when dividends were voted, and also, of the dates when dividends were payable, namely:—May 29th, 1903, June 1, 1903, November 27th, 1903 and December 1, 1903, which was objected to as incompetent, irrelevant and immaterial, but the court admitted the testimony.

63rd. The court erred in refusing to permit defendants' counsel to recall for cross examination the plaintiff, Frank T. Woodworth, under the law of Michigan, allowing a party to call the opposite party and cross examine him without making him his own witness: there being no statute of the United States on that subject, and therefore, the state law obtains.

64th. The court erred in refusing to direct a verdict in favor of the defendant Chesbrough.

65th. The court erred in refusing to direct a verdict in favor of each of the defendants.

66th. The court erred in denying the motion to strike out of plaintiff's evidence in the case, the letters of December 16th, 1903, Exhibit 99, since defendants' liability under the declaration does not extend to their acts after November 17th, 1903.

67th. The court erred in refusing to permit the witness, Andrews, to answer the—

"Q. Did you or Mr. Woodworth ever have anything to say in reference to the possible effect upon the Old Second National Bank, of this litigation?"

This was objected to as immaterial. Plaintiff claiming nothing for depreciation on that account, etc., which objection the court sustained, and excluded the testimony.

68th. The court erred in requiring the witness, Andrews, to answer the

"Q. You stated that none of the directors made any effort to charge off any paper up to November 17th, 1903, I want to carry that down to December, 1903, was that true?"

This was objected to as immaterial, occurring after November 17th, 1903, which objection was overruled, and the witness answered,

461 "I don't recall that any effort was made or any discussion in the matter. Not to my knowledge was the effort made by Mr. McGraw or Mr. Chesbrough any more than by anybody else."

69th. The court erred in refusing to permit the witness, Andrews, on re-direct examination to answer the following:

"Q. State whether or not in 1903, you heard a talk among the directors of the bank that the Maltby Lumber Company loan was perfectly secured?"

Also, the—

"Q. Mr. Andrews, after the deeds and bills of sale were given by Maltby to the Old Second National Bank or to James Davidson, as trustee, of the bank, transferring all his property, you may state whether or not you heard it discussed among the directors that they considered the loan of Maltby perfectly secure and the security good, and worth every dollar of it?"

All these questions were objected to by plaintiff's counsel as hearsay. The objection was sustained, and the testimony excluded.

70th. The court erred in permitting the witness, Andrews, to testify that he did not know at the time of an attempt of the First National Bank and its directors to get control of the Old Second National Bank, after he was asked the

"Q. Did you learn that that was the fact?"

71st. The court erred in excluding the answer of defendant, McGraw, to the following,

"Q. So that every item mentioned in the report as set out in the report was believed by you to be correct at the time?"

72nd. The court erred in excluding the answer to the following,—

"Q. I am speaking now about the acceptance of the drafts, as shown by the letters?"

The witness had just been testifying about the drafts made on the different companies, the Pennsylvania Company, the Michigan Central, etc.

Plaintiff's counsel objected to the question as leading, and the court would not permit an answer, because he held the question leading.

73rd. The court erred in requiring defendant, McGraw, to answer the following,—

"Q. So that as to this Maltby paper, and we will confine ourselves to that, every paper that the Old Second National Bank had was read over to the Board of Directors, and every renewal of it was,

also, likewise read? A. Yes, sir. And while acting as a director of the board, I paid attention to these papers as they were read off. If there was any collateral attached to, or called for by the paper, that fact was, also, read generally."

Defendant's counsel objected to this as incompetent, because the time was not limited, and because the books themselves were the best evidence. The court overruled the objection, and admitted the testimony.

Also, the—

"Q. Was that not the rule, and was it not always true? And, do you know of a single instance where it was not true?"

This was objected to as immaterial, and not the best evidence, and the witness answered—

"It might be."

74th. The court erred in requiring defendant, McGraw, to answer the—

"Q. Did you know that Mr. Maltby went through bankruptcy?"

This was objected to as not the best evidence.

Also, the—

"Q. So you relied upon these assignments made and delivered to the bank when you permitted Mr. Maltby to get the lines of credit he got from the bank?"

This was objected to as incompetent, assuming something that was not in evidence.

"A. I didn't have any of that business to do at all. That was in the hands of Mr. Bump."

Also, the—

"Q. And (you) voted to approve the line, and voted to approve every paper in the line?"

This was objected to as incompetent, irrelevant, and immaterial. Objection was overruled, and defendant, McGraw answered,—

"I did."

Also, the following question, on cross examination,

"Q. Then all you remember of this case is your knowledge of Mr. Bump, and the knowledge of Mr. Bump's faithful and honest transactions?"

This was objected to, and overruled, and the witness answered,—

"I was guided largely by the knowledge we received from Mr. Bump, as to the treatment of the Maltby paper."

Also, the—

"Q. Not a single one of those drafts was forwarded for acceptance, or accepted by the firm or corporation upon which it was drawn?"

This was objected to as incompetent. The objection overruled, and the witness answered,

463 "That is true, they were not. I cannot remember the amount of the drafts in 1902."

Also, the following—

"Q. And you knew that every dollar of that line over and above ten per cent. of the undivided profits and surplus and capital, was in violation of law?"

This was objected to as incompetent, being a legal question. The objection was overruled, and the witness answered,—

"I never looked at it that way."

Also, the—

"Q. Mr. McGraw is it not true that during the entire year of 1902, the matter of the Maltby line was discussed by the board of directors at nearly every meeting?"

This was objected to as already been asked and answered on the cross examination. The objection was overruled, and the witness answered,—

"It was spoken of a great many times that year at our meetings."

Also the—

"Q. And it was talked of between the directors whenever two or more of them happened to meet?"

This was objected to as incompetent. Objection overruled, and the witness answered,—

"Not always when we met, but often."

Also the—

"Q. Will you explain what items were recorded, and what was done that was not recorded?"

This was objected to as incompetent, the record being the best evidence. The objection was overruled, and the witness answered,—

"Why, it was the general discussion, and the minutes would not contain that."

Also, the witness having referred to the National Bank examiner, he was asked the—

"Q. And he criticized the line?"

This was objected to as immaterial, which objection was overruled, and the witness answered,—

"I talked with the Examiner about the paper; I asked him if he had any suggestions to make as to the treating of the paper. He told me that we were doing all we could, and rather not criticizing, but rather supporting our contention, the way we were treating it; agreed with us; said we were doing all we could; that is a true statement made to the Examiner."

Also, the—

"Q. From your knowledge of that, do you think you can go to that box and pick out a single instrument that shows at 464 that time, viz: October 21, 1902, that there was any shipment on the road from seller to buyer?"

Objected to as incompetent, and not proper cross examination, not referred to on direct examination, and as not the best evidence. The objection was overruled, and the witness answered,—

"I can not say now. I don't know anything about those papers. I could not identify a single one of them."

Also, the—

"Q. Why, you hadn't made a new loan to Maltby prior to October 21, 1902, and after the first of June, 1902, because during that entire time you were reducing the line, were you not?"

Defendants' counsel objected to the form of the question, and

use of the singular "you." The objection was overruled, and the witness answered,—

"That is true. I knew it didn't take any four months to make any shipment to any place the Maltby Lumber Company was doing business with."

Also, the—

"Q. You knew there wasn't a live bill of lading in possession of the Old Second National Bank at that time representing actual shipments in process from the seller to the buyer?"

This was objected to, because these things were not only being shipped, but the railroad companies were notified of the shipment and they were writing back that they would send the proceeds when collected to the Old Second National Bank. These letters are in evidence, and the statements upon which the witness is being examined, are not true. The objection was overruled, and the witness answered,—

"I can't answer, because I can't recall the facts."

Also, the said witness, McGraw, was asked on cross examination,—

"Q. Now, it developed that this amount was not twenty per cent, of the amount of the drafts the bank actually had?"

This was objected to, as an incorrect statement of the testimony the witness has said he knows nothing about it, and counsel is trying to testify himself, and it is objected to as being incompetent and not proper. The objection was overruled, and the witness answered,—

"That may be true, but I can't recall."

Also, the—

"Q. You knew that the amount that was shown to be owing by these several companies to the Maltby Lumber Company was a small percentage not exceeding twenty-five per cent of the paper then held by the Old Second National Bank drawn by Maltby upon the several companies; the condition of which had been investigated?"

This was objected to as improper, and as accusing the witness instead of asking him for his opinion. The objection was overruled, and the witness answered,—

"A. I knew the face of the draft was not paid, but as to the percentage, I can't say. I can't say that I understood how much there was at that time."

Then followed the—

"Q. Do you know it was more than two hundred thousand dollars?"

This was objected to as incompetent, and immaterial. The objection was overruled, and the witness answered,—

"I can't say."

Also, the—

"Q. And then you say, do you not, that you then knew that the Maltby line was good?"

This was objected to, and the objection was overruled, and the witness answered,—

"I said I believed I didn't know whether it was good or not."
Also, the attention of the witness was called to some of his testimony during the cross examination on the former trial, and he was asked the—

"Q. Did you give that testimony?"

Before that question was answered, I want to call attention to the fact that this was part of the gentleman's cross examination on the former trial, and that he then had the statement Mr. Maltby furnished in his hand, and was reading those items; and I submit this is not a contradiction of his testimony, and that it is improper and incompetent to ask him this question under the circumstances. The objection was overruled, and the defendant, McGraw, answered,—

"I could not tell the dollars and cents; I must have had the statement read to me, or I read it myself. I cannot recall amounts of money like that. If you have read the statement, and it was a statement made or read by Mr. Maltby, I accepted all you read."

Also, in requiring the witness to answer the following,—

"Q. Was the fact that Mr. Lewis was put in charge of the business, or whatever position he had in connection with the business, made public or kept secret?"

This was objected to as immaterial. The objection was overruled, and the witness answered,—

"There was never any motion or any talk in the board to keep that secret. In fact most every one knew that he was there; every one of the board did. Everybody in town knew that Jim Lewis was engaged in that office. I think many persons in Bay City knew that he was there for the Second National Bank. Mr. Carrington knew it. He was not a stockholder in the bank when."

Also, in admitting the answer, to the following—

"Q. Do I understand you to say, Mr. McGraw, at the time these letters were sent to the various customers of Maltby for the purpose of ascertaining what they actually owed the Maltby Lumber Company, you did not keep in touch with the situation to see what the true conditions were?"

This was objected to as incompetent. The objection was overruled, and the witness answered,—

"If that information was received at that time; whatever that information was, was made known to the board, to all the members if they were there. All the members were not always there."

Defendants' counsel moved that the last sentence (answer) be stricken out, as it appears from the testimony that Mr. Chesbrough was absent in Chicago, from the latter part of October, 1902, until March 1903, except for the meeting of November 23rd. The motion was overruled.

Also, in permitting the following,—

"Q. Do you say you were perfectly willing, during 1902 and 1903, for the public to know that the Old Second National held Maltby Lumber Company paper to the amount of over four hundred thousand dollars?"

This was objected to as incompetent whether he was willing or not, and the witness answered,—

"I will say that the public, as we understood on the board, was aware of the fact that that amount of paper existed in our bank during 1903; for it was talked of, and we heard of it; there was no secrecy about it, the stockholders who owned the stock knew of it."

Also, the—

"Q. When did you understand the public was aware of it?"

This was objected to as incompetent. The objection overruled, and the witness answered,—

"It was part of the board's business to keep their business to themselves, and as an officer of the bank, I had no right to speak of it."

Also, the—

"Q. I ask you whether you heard Judge Collins say on the witness stand, at the former trial of this case, that the deeds of real estate were taken in the name of James Davidson, and not otherwise, and he gave the reason therefor?"

467 This was objected to as immaterial, and the court said,—

"I am inclined at present to think the objection is good, but the question may be asked."

The witness answered,—

"I can not recall such a statement."

Also, the—

"Q. How did you come to get the Aaron Chesbrough stock into your possession?"

This was objected to as immaterial. The objection overruled, and the witness answered,—

"I think he wrote me a letter."

75th. The court erred in refusing to permit the witness, McGraw, upon re-direct examination to answer the—

"Q. Were the letters read here yesterday in connection with that same matter?" (Railroad companies refusing to accept drafts.)

This was objected to as leading, and the court excluded the answer.

76th. The court erred in permitting on re-cross examination, the following,—to witness McGraw,—

"Q. Just look over that paper, and see in what instances you found more than there was given in the Maltby inventory?" (Handing witness Exhibit No. 223.)

This was objected to as incompetent, as that shipping had been going on between the time Mr. Maltby submitted his inventory, and Mr. McGraw made his inventory, but the objection was overruled, and the witness required to answer the question.

77th. The court erred in permitting attorney for plaintiff, to make the statement when exhibit 225 was offered and received in evidence. "We take the position of making no objection as to the history of the transaction, but we object to them substantive evidence of the good faith of the defendant."

Defendants' counsel excepted to the statement, and the court made no remark or ruling.

78th. The court erred in refusing to permit the witness, Martin M. Andrews, to answer the—

"Q. Did the bank lose any money on account of the indebtedness of The Maltby Lumber Company, to-wit: by reason of the fact that the drafts were not forwarded for acceptance?"

This was objected to as calling for a conclusion. The court sustained the objection, and excluded the testimony.

79th. The court erred in refusing to allow the witness James E. Davidson, one of the directors of the bank, to answer the—

"Q. State what you did with reference to the signing of that report?" (Sept. 9th, 1903.)

Plaintiff's counsel objected to why he signed it; it was immaterial. The objection was sustained, and the court excluded the testimony.

80th. The court erred in refusing to permit the witness, James E. Davidson, to answer the—

"Q. Did Mr. Frank T. Woodworth ever commence suit against you about this stock?"

To which plaintiff's counsel objected,—the objection was sustained, and the testimony excluded.

81st. The court erred in refusing to permit the witness, James E. Davidson, to answer the—

"Q. State whether or not from time to time, you talked with Mr. Bump about the Maltby line?"

This was objected to as immaterial and hearsay. Sustained by the court, and the testimony excluded.

82nd. The court erred in refusing to permit the witness, James E. Davidson, to answer the following—

"Q. What assurance, if any, did Mr. Bump, the president of the bank, give you with reference to the line of the Maltby Lumber Company prior to November 17th, 1903?"

Plaintiff's counsel objected to this as immaterial and hearsay. The objection was sustained, and no answer permitted.

83rd. The court erred in refusing to permit the witness James E. Davidson, to answer the

"Q. In 1902 and 1903, after the securities had been given to the bank, after Mr. Lewis, about the first of the year, had been put into the Maltby office—or before that time—did you regard the Maltby line of paper as secured?"

Plaintiff's counsel objected. The objection was sustained, and the answer was excluded.

84th. The court erred in refusing to permit the defendant, Frank P. Chesbrough, to answer the question, on redirect examination.—

"Q. Did you believe that the loans and discounts that you had on hand were worth (in April 1903) as far as anybody could estimate, the business that you had on hand, the amount listed in the statement?"

This was objected to by plaintiff's counsel as leading, and was excluded.

85th. The court erred in refusing to permit the said defendant, Chesbrough, to answer the—

"Q. And who did the other directors rely on in reference to that matter, at the same time, (the Maltby line)?"

86th. The court erred in refusing to permit the defendant, Chesbrough, to answer the—

469 "Q. At that time, (April 1903) did you believe that paper to be secured?"

87th. The court erred in refusing to permit the defendant, Chesbrough, as a witness in his own behalf, on direct examination, to answer the—

"Q. And when you signed these two reports in April of 1903, and in November of that same year, did you believe that the loans and discounts listed in that report, so far as they included the Maltby Lumber Company paper, was good?"

This was objected to as leading, and the answer was excluded.

88th. The court erred in admitting in evidence the statement of the dividends of the bank found on page 406 of the printed record of the former case.

89th. The court erred in permitting the defendant, Chesbrough, on cross examination, to be asked the—

"Q. Wasn't the extent you went to at that time, that you didn't remember whether you met him or not, or didn't remember what he said?"

Defendants' counsel objected to that, that if the witness was going to be questioned as to his testimony, that his testimony should be read to him, or shown him; which objection was overruled.

90th. The court erred in requiring the defendant Chesbrough on cross examination to answer the—

"Q. And at that time the Old Second National Bank had this entire Maltby line and had absolutely no security outside of whatever security was offered by the papers that are attached to the drafts in the bank, and now in that red box?"

Defendants' counsel objected to the question as it assumes a statement that is not correct under the evidence. The court ruled the witness should answer, and he did answer.

"A. I don't know the bank had absolutely no security."

91st. The court erred in permitting several questions to the witness Chesbrough, one of the defendants, as to how many reports would be required by the comptroller of the currency in the course of a year, and as to the requirements of the comptroller about attaching a copy of the report to the paper from which it was published.

All of which were objected to as statements, or as a matter of law.

92nd. The court erred in requiring the witness, Chesbrough, on cross examination, to answer the—

"Q. Now, as a matter of fact, you did know that the drafts were not forwarded for acceptance, did you not?"

This was objected to, and the witness answered,—“I guess that is right. I did know.”

470 93rd. The court erred in requiring the defendant, Chesbrough, on cross examination, to answer the—

"Q. He was there representing the bank, but ostensibly as an employe of the Maltby Lumber Company? You knew that?"

Which was objected to as incompetent and immaterial, and the witness answered,—

"I knew that Lewis was in the office."

94th. The court erred in requiring said witness, on cross examination, to answer the—

"Q. At that time, do you mean you wanted the public to know that Mr. Lewis was in that office, representing the Old Second National Bank?"

This was objected to as incompetent, irrelevant, and immaterial, and not proper cross examination. The objection was overruled, and the witness answered,—

"I don't know as we were asked anything about what the public thought."

95th. The court erred in permitting the following question to be asked the witness, Chesbrough, after he had been asked several questions as to what his position was with reference to signing the report.

"Q. You heard counsel arguing the case to the court, from time to time?"

Which was objected to as incompetent. The objection was overruled, and the defendant answered,—

"Yes, sir."

96th. The court erred in requiring the witness, Chesbrough, on cross examination, to answer the—

"Q. And you knew no paper should be carried as paper, as loans and discounts, unless that paper was good?"

This was objected to as incompetent. Objection was overruled, and the witness answered,—

"Yes, sir."

97th. The court erred in requiring the witness, Chesbrough, to answer the following questions, referring to a date after November 17th, 1903.

"Q. You did find out it was bad, didn't you?"

Also, the,

"Q. To what extent? A. I don't remember."

Also, the—

"Q. You found out it was bad to the extent of over \$225,000.00—did you not? A. I wouldn't say I did."

Also, the—

"Q. You charged off over \$200,000.00 of paper as bad while you were in the bank? A. I don't remember whether I was a director when that was charged off."

471 98th. The court erred in requiring the witness, Chesbrough, on cross examination, to answer the—

"Q. You have found out since the other trial, it was necessary, in order for you to succeed in this case, for you to show that at that time you did believe the paper was good, haven't you?"

This was objected to as incompetent, not proper cross examination, and as a question of law. The objection was overruled, and the witness answered,—

"I would not say that."

99th. The court erred in requiring the witness, Chesbrough, on cross examination, to answer the—

"Q. And you carried this same paper at its full face value during the entire year of 1904, on the books of the Old Second National Bank?"

This was objected to as incompetent, not proper cross examination under the declaration, and as incompetent and immaterial to the issue that is in this case.

The objection was overruled, and the witness answered,—

"I think we did."

Defendants' counsel farther objected that what happened in 1904, can not be taken into consideration by the jury in this case, and one of plaintiff's counsel stated,—“We are not claiming any probative force for what occurred in 1904, except as a part of the cross examination of this witness. I submit it is entirely proper cross examination.”

And the other counsel for plaintiff stated,—“We do not claim any liability as to what he did in 1904. It simply goes to the credibility of the witness.”

Whereupon, the court again overruled the objection.

It was then further stated by defendant's counsel that neither one director nor two directors, could charge off any paper. It was for the board of directors to do that. Which objection was overruled.

100th. The court erred in requiring the defendant, Chesbrough, on re-cross examination, to answer the following,—

"Q. And you knew, when these wood products arrived at their destination they would be taken away by the C. M. & St. Paul Railway Company, did you not?"

This was objected to as incompetent, because the paper spoke for itself, and there was no evidence that they knew anything about this particular paper. The objection was overruled, and the witness answered,—

"Presumably, yes, sir."

101st. The court erred in requiring the witness to answer questions upon cross examination, in reference to papers taken from the red box, which were not referred to in his direct examination.

472 The papers, bills of lading, etc., not being shown to be in the same condition in which they were in 1902, etc.

There was a general objection on the part of defendants' counsel,—to all this line of cross examination, which the court overruled.

102nd. The court erred in not striking out that portion of the cross examination of the witness, Alvin Maltby, as appears in his deposition, which did not relate to any matter testified to by him upon his direct examination.

103rd. The court erred in refusing to permit defendants' witness, Edgar B. Foss, to answer the—

"Q. State whether or not the employees of the bank, the book-keepers, tellers, and other employes of the bank, so far as you know, in the years 1902 and 1903, were honest and competent?"

This was objected to by plaintiff's counsel as immaterial, coupled

with the statement that they did not attack them in any way, and the court excluded the testimony as having been gone over before.

104th. The court erred in refusing to permit the witness, Foss, to answer the—

“Q. Why did you sign these reports, Mr. Foss? (Referring to the reports of the condition of the bank to the comptroller of the currency).”

This was objected to as immaterial by plaintiff's counsel, and the court excluded the answer.

105th. The court erred in excluding answers to the following questions to the same witness Foss.

“Q. At the time you signed those reports, Mr. Foss, did you believe the reports to be true?”

“Q. At the time you signed those different reports, what was your judgment as to whether or not the reports were a correct transcript of the books of the bank?”

Same objection and same ruling in each case, and the testimony was excluded.

106th. The court erred in refusing to permit the witness, Foss, to answer the following,—

“Q. And what information did you have from Mr. Bump in 1902, say the 1st of May, 1902; what information did you have from him as to the status and condition of that line of discounts?”

And, in refusing to permit the said witness to answer the—

“Q. At the time you signed those different reports to which I have called attention, namely, the reports to the comptroller, how did you regard the Maltby line of discounts?”

473 107th. The court erred in refusing to permit the witness Foss, upon direct examination, to answer the following—

“Q. Did you regard the Maltby paper during the time prior to 1903 as secure?”

“Q. State whether or not the board of directors relied upon Mr. Bump's statement?”

“Q. State whether or not you relied upon the information given you by Mr. Bump with reference to the Maltby line?”

108th. The court erred in refusing to permit the witness, Foss, to answer the—

“Q. State whether or not, you then (Jan. 1903) regarded the line of the Maltby Lumber Company in the Second National Bank as secured?”

“Q. What was the judgment of the board at that time as to whether or not this account was secured?”

109th. The court erred in permitting the statements made by Mr. Clark at the close of the examination of Mr. Foss in reference to the Maltby inventory, and to his comments on the inventory itself. Exhibit 247.

110th. The court erred in permitting his statements and comments with reference to the inventory of Oct. 31st, 1902.

111th. The court erred in admitting the testimony of G. W. Ames in rebuttal, in reference to a statement taken from his books as to

sales of the stock of F. P. Chesbrough, F. P. Chesbrough, his brother, A. J. Cooke, Orrin Bump, and E. T. Carrington.

112th. The court erred in requiring the witness, Lewis, to answer the—

“Take the River Rouge yard, was your attention called to any poles there that had been shipped to the telegraph companies in care of the Maltby Lumber Company, at the River Rouge, or in Pinconning?”

This was objected to as immaterial, and the reason given, but the court held the inquiry proper.

Also, the following,—

“Q. Take those mills that you spoke of, you don't know that the Maltby Lumber Company owns those mills, do you?”

This was objected to, and the witness answered—

“I don't know who owns a mill any more than I was told.”

112th. The court erred in excluding the testimony of Frederick P. Browne, cashier of the First National Bank at Bay City continuously for twenty-eight years, and still cashier of that bank, and it was agreed by counsel that the testimony of Mr. Browne as it appears on the previous trial, should be offered as if the person were personally present. The defendants offered to show what the

474 custom in Bay City was with reference to signing reports by directors.

The court held that was immaterial, and excluded the testimony.

113th. Defendants' counsel then asked the following—

“Q. State whether or not during your incumbency of the office of cashier of the First National Bank, it has been the custom of the directors of that bank who were called upon to attest the report, from time to time, which was sent to the comptroller, to sign the report when prepared and verified by the cashier, making no further examination of the affairs of the bank than, in some instances, to compare the report with the previous report, or with the daily statement of the bank, to see whether or not it actually compared with the statement?”

This was objected to as immaterial, leading, irrelevant, and incompetent, and the objection was sustained.

114th. Defendants' counsel then asked said witness this—

“Q. State whether or not, in any case, any director of the First National Bank of Bay City, who was called upon to attest a report sent to the comptroller, made any other investigation of the affairs of the bank prior to his attesting the report than to look at the books of the bank and see whether or not the statement compared with the book?”

To which the same objection was made, and the court excluded the testimony.

Defendants' counsel then offered to show by several banks of Bay City the same things he offered to show by the last witness, and the court ruled, it is irrelevant and immaterial to this issue, and excluded the testimony.

115th. The court erred in refusing to permit defendants' counsel

to cross examine the plaintiff by the Michigan Statute when called the second time for that purpose.

116th. The court erred in permitting the plaintiff on re-direct examination to answer the—

“Q. Had you received any dividends on this stock during the time that you held it?”

Which was objected to as immaterial, and not proper. The objection was overruled, and the witness answered,—

“The first year that I owned it, I received five percent. semi-annual dividend,—nothing after it.”

117th. The court erred in refusing to allow plaintiff to answer the following,—

“Q. From 1905, after the time that you resigned from the board of directors of the Second National Bank, and since you commenced this litigation in behalf of yourself and your relatives, state whether
475 or not the litigation has been pending in one form or another or in one court or another, ever since then until now?”

This was objected to as immaterial; the objection sustained, and the testimony excluded.

Also, the—

“Q. State whether or not that has not depreciated very much the value of the stock?”

Same objection, and ruling, and the testimony was excluded.

118th. The court erred in refusing to grant the motion of counsel for Mr. Chesbrough at the conclusion of the case to direct a verdict in his favor, and also, a motion made at the same time in reference to Mr. McGraw, and for both the defendants.

119th. The court erred in refusing to grant the motion of defendants' counsel to strike out of the case anything relating to any matter happening after November 17th, 1903, with the exception of the two reports signed by the plaintiff, Woodworth, of January 11th, and May 29th, 1905, for the reason that paragraph two of the opinion of the Court of Appeals in this case holds that defendants' liability can not be estimated of any date later than November 17th, 1903; which motion was denied.

120th. The court erred in refusing to charge the jury, as requested, in each of the twenty-one requests to charge submitted by them at the close of the testimony.

121st. The court erred in charging the jury, as follows:

“It is claimed that all of these violations of the statute were part of a general design on the part of the defendants to deceive the public. This part of plaintiffs' claim stated in the tenth count therefore treats all of the defendants' acts as part of one general design to deceive the public, and treats all of plaintiff's purchases and damages as resulting from this design, and recoverable as a whole.”

122nd. The court erred in charging the jury, as follows:

“In addition to the tenth count of the plaintiff's declaration, which is referred to there are the first, second, fourth, and fifth counts, which rely respectively on the reports of February 6, April 9, September 9, and November 17th, 1903, and treat each purchase of stock

by plaintiff as a separate cause of action resulting from the publication of the preceding report. These counts, therefore, enable you to consider each report and each purchase by itself, if you think they should be so considered. Plaintiff does not claim, and is not required to prove that the defendants actually signed their names on the
 476 copies of the report which were sent to the printer, or that defendant, Chesbrough, signed all of the reports, or that his name was printed on all of them."

123rd. The court erred in charging the jury as follows: -

"The underlying fault, if any such was committed in this case, was in the failure of the board of directors of the bank to write off such part or portion of the loans and discounts as they then knew to be bad, if any."

124th. The court erred in charging the jury, as follows:

"If the defendants knew this, and it is my memory of the testimony that they both admitted that they did, it is not important whether both of them or either of them attested each report."

125th. The court erred in charging the jury as follows:

"For these reasons the act upon which liability depends is not the signing of the report itself, but the failure to make reasonable personal efforts to induce the board to charge off assets which have become worthless, if assets have actually at that time become worthless, and are at that time known to said director to be worthless."

126th. The court erred in charging the jury, as follows:

"It is not necessary for the plaintiff to prove any actual conscious design or intention on the part of the defendants to mislead or deceive the plaintiff."

127th. The court erred in charging the jury, as follows:—Referring to the reports of January 11th, and May 29th, 1905.

"The mere fact that plaintiff signed the 1905 reports or either of them does not prevent his recovery, and does not excuse the defendants if they are otherwise liable."

128th. The court erred in charging the jury, as follows:

"If plaintiff relied upon the published reports, it makes no difference whether he did or did not make additional investigation. His negligence, if any, is not a defense in an action of this kind."

129th. The court erred in charging the jury, as follows:

"It is not necessary for plaintiff to show that defendants actually derived any benefit from the claimed violation of the statute. Plaintiff's right to recover, if any, depends upon his loss, and not upon their gain."

130th. The court erred in charging the jury as follows:

"You are not concerned in this case with what Mr. Andrews knew or believed or what any of the directors knew or believed, except the defendants themselves."

477-481 131st. The court erred in charging the jury as follows:

"Plaintiff was not compelled to sue all of the directors who signed the reports or who served during the years complained of, but he had a right to select the two defendants, and to sue them alone if he desired."

132nd. The court erred in charging the jury, as follows:

"Plaintiff claims that he is entitled to recover his proportion of the sum of \$200,000.00, which he claims to be the difference between the fair market value of the entire capital stock of the bank if all the Maltby paper had been of a character entitling the directors to report it as assets, and that sum which would have been its fair market value if the defendants had written off so much of the Maltby paper as it was their duty to write off."

Wherefore, the plaintiff in error prays that the judgment of said Circuit Court may be reversed, set aside, and held for naught.

THOMAS A. E. WEADOCK,

Attorney for Plaintiff in Error, Frank P. Chesbrough.

January 30th, 1914.

482 *Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.*

Entry—Cause Argued and Submitted.

(February 4, 1915. Before Warrington, Knappen and Denison, Circuit Judges.)

United States Circuit Court of Appeals for the Sixth Circuit.

#2634.

FRANK P. CHESBROUGH

v.

FRANK T. WOODWORTH.

This cause is argued by Mr. Thomas A. E. Weadock for the plaintiff in error and by Mr. Edward S. Clark for the defendant in error and is submitted to the court.

Opinion.

(Filed April 6, 1915.)

483 Filed Apr. 6, 1915. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2634.

FRANK P. CHESBROUGH, Plaintiff in Error,

vs.

FRANK T. WOODWORTH, Defendant in Error.

Error to the District Court of the United States for the Eastern
District of Michigan.

Submitted February 4, 1915; Decided April 6, 1915.

Before Warrington, Knappen and Denison, Circuit Judges.

DENISON, Circuit Judge:

The broad questions regarding the right of action in this case were considered and decided by this court upon a former writ of error (195 Fed., 875). It is unnecessary to restate the facts. It then appeared that the jury had found a verdict upon the theory that defendants, as directors of the bank, had become subject to a duty to charge off from the books of the bank the sums of \$233,000 and \$70,000 which were, in fact, ultimately lost by the bank upon liquidation of the Maltby and Brotherton debts, respectively; and it is this reduction of the directors' duty in this respect to terms of dollars to which we propose to refer as the "basis" of recovery. We held that, for lack of proof, the Brotherton loss must be excluded from such basis; that the proof fairly tended to support the \$135,000 basis as to the Maltby loss; but that beyond this sum the proof as to the Maltby loss was too conjectural and speculative to support a verdict. We reached this conclusion, because the

484 proofs tended to show that defendants, during 1903, either in fact knew or must be charged with knowing that a large share of the Maltby debt was bad, and because, while there was nothing definite to show how much was then known to be worthless, the fact that the directors did, within the next year, charge off \$135,000 was sufficient to convert mere conjecture into reasonable inference; and so the verdict had support up to the \$135,000 basis, and not beyond. We found ourselves unable to accept plaintiff's offer of remittitur and to affirm the judgment to the extent of this basis, because of other errors which entitled the defendant to a new trial of the main issues.

Upon the second trial, the plaintiff abandoned any claim to recovery dependent on the Brotherton loss; and with regard to the

Maltby debt, plaintiff claimed and recovered a verdict upon the basis of \$200,000, being \$65,000 in excess of the basis which, if our former decision be accepted, it must be conceded the proof tends to support; and defendant Chesbrough, after severing McGraw, alone brings error. Instructions given to the jury to guide it in reaching the basis of recovery, were substantially in harmony with the rules which we indicated; and so the question is whether new evidence on the second trial justified at all the jury in finding the whole or any part of this \$65,000.

There is only one substantial difference in this respect between the records on the two trials. Upon the first trial, it appeared that the bank directors had taken possession of the Maltby business, were engaged in its liquidation and were bound to know there would be a large loss; and that the total loss actually resulting several years later was \$233,000. There was nothing to fix upon the directors knowledge during 1903, of specific values of items of Maltby property, leading up to actual total value of the Maltby assets. On the second trial, it appeared that early in November, 1902, Maltby presented to the bank his complete inventory and statement, made as of October 31, 1902, and showing assets of \$597,000, and liabilities of \$412,000 and "net present worth", \$185,000; that the directors appointed defendant McGraw to make an investigation of the Maltby assets; and that McGraw made an inventory called a "report", the date of which should presumably be assumed to be

about the middle of December, in which report he gave his own estimate of certain values; and which values, as far as they are comparable with figures in the Maltby inventory, average much smaller. Plaintiff submitted to the jury and presents here an elaborate analysis and computation in the nature of an argument that the McGraw report tends to show that the assets were worth not more than \$204,000, and, hence, that instead of a surplus, there was a deficit of \$208,000. In argument to the jury, plaintiff abated these figures \$8,000 for possible uncertainties, and so reached the \$200,000 basis which the jury accepted.

We think there was evidence fairly indicating that the McGraw report was known to Chesbrough; and so there is presented the sharp question whether that report substantially tended to prove the \$200,000 basis. We appreciate the caution with which an appellate court must approach such a question under a writ of error; and we realize that such a verdict must not be declared unsupported by any evidence, unless the proposition is one upon which reasonable minds cannot differ. At the same time, we realize that directors who, perhaps without any fault on their part, find their bank confronted with an enormous loss, may be compelled to choose between precipitating a panic and ruining the bank if they make full and public disclosure, and, on the other hand, by gradual disclosure, saving the bank from collapse and retrieving part of the loss; that this is a hard choice; and that while this hardship cannot bar the statutory result of their proved violation of law, yet it entitles the directors not to be condemned upon mere guess-work and surmise years after the event, when the earlier duty in the face of then exist-

ing uncertainty is so likely to be judged by the certainty later developed. These considerations justified us in holding the verdict excessive on the former trial, and they justify us in adhering to the same point of view. From this point of view, we are compelled to think that the McGraw report is legally insufficient to have its claimed effect. It does support the inference that the directors were put on notice regarding the reliability of the Maltby inventory, and it might support the inference that Chesbrough was negligent in not then ascertaining that the loss would be as great as it proved to be; but such negligence is not the issue. To this plaintiff, Chesbrough is liable only for that conduct which is practically equivalent to intentional misleading; and evidence well supporting a charge of negligence may have no legal tendency to support a finding of intentional or reckless wrong. We have reached this conclusion after study and analysis of the McGraw report as compared with the Maltby inventory. It would unduly extend this opinion to go much into the details of this comparative analysis. It is sufficient to notice, among other things: that plaintiff's theory requires a finding that the directors knew the Maltby assets would realize less than 45% of Maltby's figures; that there was an interval of time between Maltby and McGraw during which shipments had been continued, of which shipments or their proceeds the McGraw list takes no account and which there is reason to think might reach \$30,000; that the two are, in many respects, incapable of comparison; that the McGraw inventory does not, on its face, purport to be and is not shown to have been complete; that it (seemingly) wholly omits any reference to the stock on hand in the two main yards, which two items, by the Maltby inventory, amount to \$153,000; that it wholly omits any reference to other classes of property inventoried by Maltby at \$201,000, and as to which it is proved only that they did not have the Maltby stated value, but the actual value of which is left to surmise; that items amounting to many thousands of dollars found in McGraw's detail sheets are omitted from his recapitulation; etc., etc. We therefore hold that the submission to the jury should have been limited to the \$135,000 basis. Traveling through such uncertain footing, the presence of a reasonably safe spot to stand on emphasizes the danger of trying to stand anywhere else.

In reaching this conclusion, another feature has distinct force: After plaintiff became a director and while the bank continued to carry and report as assets all the Maltby paper above \$135,000, plaintiff joined in these reports. We held that this did not amount to an estoppel, but was in the nature of an admission having evidential force. The McGraw report, which is said to establish knowledge against Chesbrough, became part of the books and papers of the bank and was presumptively known also to Woodworth when he signed the reports of 1905. By so much is the evidence against plaintiff stronger than it was before, and by so much more does it seem probable that he is himself guilty of the same kind of conduct upon which he relies to establish his claim against Chesbrough.

487 This increases the necessity that his case should be supported by testimony clearly fit to induce conviction rather than by vague inferences; and this consideration alone is enough to put this case almost in a class by itself as to the degree of proof required to justify submission.

Several assignments of error raise in one form or another the theory that defendant could be liable under the declaration only for the affirmative action of the board, or only if the board as a body did or omitted something against the duty of the board as a body. In the main, these contentions are sufficiently disposed of by the previous opinion; but they present also the specific complaint that the other directors, not defendant, were not allowed to testify that they personally believed the Maltby paper to be well enough secured, so that it was mostly good. The issue was, in this particular respect, not what they believed, but what Chesbrough believed. It often might well be that what one director believed would have some relevancy, in a popular and even in a legal sense, upon the question of what another director believed; but that cannot be the rule, in a situation like this. The conclusion which a director would form about the value of the Maltby assets would depend upon many elements,—among them (1) the extent to which his personal confidence in Maltby was impaired (2) the extent of his knowledge about the assets and from other sources than Maltby (3) his expert knowledge of this particular branch of lumber business, and his resulting skill in valuing the assets of a going business, and, (4) his individual tendency to look on the bright or the dark side of the matter. Perhaps it could be assumed that Chesbrough was in the same situation as the other directors as to the second above recited element; there can be no such assumption, as to the other three. We think the trial court was right in confining the testimony of the other directors to their acts, and in refusing to permit them to declare their state of mind.

A very large number of assignments of error is presented. Those which do not raise the same questions disposed of on the former hearing, we have examined; and we do not find that any one of them is based on prejudicial error. Insofar as they do raise again the same questions which we have once determined, we assume that they are now only intended properly to shape the record for review by the Supreme Court.

488 If the plaintiff, within 30 days from the filing of this opinion, files in the court below his written election to reduce the judgment by the sum in which it exceeds the \$135,000 basis, and files in this court a certified copy of such remittitur, the judgment, as so modified, will be affirmed; otherwise, and for the reasons stated, it will be reversed and the case remanded for a new trial. In either case, Chesbrough will recover the costs of this court. The plaintiff, if he desires to abate, should prepare and give to the defendant a statement showing his basis of apportionment and interest computation; if counsel do not agree upon this result, the matter can be summarily submitted to us.

489

Certified Copy Consent to Remittitur.

(Filed May 7, 1915.)

UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of
Michigan, Northern Division.

No. 137.

FRANK T. WOODWORTH, Plaintiff,

vs.

FRANK P. CHESBROUGH, Defendant.

In compliance with the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, filed April 6, 1915, the above named plaintiff hereby remits from the amount of the judgment entered herein on November 22, 1913, (said judgment having been entered at the sum of \$23,714.00) the sum of \$7,708.56, leaving the amount of said judgment the sum of sixteen thousand and five dollars and forty-four cents (\$16,005.44) which is entered as of November 22, 1913, and is to bear interest from that date, at five per cent.

This remittitur is filed in compliance with the opinion of the Circuit Court of Appeals as aforesaid, for the sole purpose of obtaining the entry of a final judgment herein, and of securing the
490 affirmance of that part of the judgment which is not so remitted, and is intended to be without prejudice to plaintiff in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States, which cross proceeding follows and continues to be in connection with any proceeding prosecuted in that court by defendant for the purpose of reviewing said judgment of the Circuit Court of Appeals.

FRANK T. WOODWORTH,

*Plaintiff,*By GILLETT & CLARK,
JOHN C. WEADOCK,*His Attorneys.*

Dated May 5th, 1915.

Endorsed: No. 2634. In the Circuit Court of Appeals for the Sixth Circuit. Frank P. Chesbrough, Plaintiff in Error, vs. Frank T. Woodworth, Defendant in Error. Certified Copy of Remittitur. John C. Weadock, Gillett & Clark, 230-231 Shearer Bldg., Bay City, Mich., Att'ys for Def't in Error.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy of Remittitur filed May 5th, 1915, in the therein entitled cause as the same appears on file and of record in my office; that I have compared the same with
 491 the original, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Bay City, in said District, this fifth day of May, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America the one hundred and thirty-ninth.

[SEAL.]

ELMER W. VOORHEIS, *Clerk*,
 By O. BALLOU, *Deputy Clerk*.

Ten cent documentary stamp.

Endorsed: No. 137. The District Court of the United States, Eastern District of Michigan, Northern Division. Frank T. Woodworth, Plaintiff, vs. Frank P. Chesbrough, Defendant. Certified Copy of Remittitur filed May 5, 1915. Filed May 7, 1915. Frank O. Loveland, Clerk.

Judgment.

(Filed May 11, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

2634.

FRANK P. CHESBROUGH, Plaintiff in Error,
 vs.
 FRANK T. WOODWORTH, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Michigan, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, Northern Division, and was argued by counsel.

The court having filed its opinion, and defendant in error, Woodworth, having thereupon filed in this court a certified copy of a remittitur filed by him in the court below whereby it appears that the judgment complained of herein has been reduced by the sum of
 493 seven thousand seven hundred eight dollars and fifty-six cents (\$7,708.56) so that it now stands in the court below as a judgment for sixteen thousand five dollars and forty-four

cents (\$16,005.44), and costs, entered as of November 22, 1913, and bearing interest from that date at five per cent.

It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause, as so reduced, and as so standing after such reduction, be, and the same is hereby affirmed; but that plaintiff in error, Chesbrough, recover the costs of this court.

The remittitur so filed having contained the clause stating that it was intended to be without prejudice to plaintiff below (Woodworth) in the prosecution by him of a cross writ of error or proceeding in the Supreme Court if defendant below should proceed in that court to review this judgment, and this court being unwilling to embarrass the party, Woodworth, in his attempt to preserve any right of review to which he may be so contingently entitled, approval of such remittitur as a sufficient compliance with the opinion on file, is not withheld because of the presence therein of such attempted
494 reservation; but such approval is not to be taken to imply that such right of review can thereafter exist, or that such attempted reservation has any effect to make the remittitur other than absolute and unconditional.

Enter.

DENISON, J.

Endorsed: No. 2634. United States Circuit Court of Appeals, Sixth Circuit. Frank P. Chesbrough vs. Frank T. Woodworth. Judgment. Filed May 11, 1915. Frank O. Loveland, Clerk.

Petition for Writ of Error.

(Filed June 10, 1915.)

United States Circuit Court of Appeals, Sixth Circuit.

FRANK P. CHESBROUGH, Plaintiff in Error,

vs.

FRANK T. WOODWORTH, Defendant in Error.

Your petitioner, Frank P. Chesbrough, plaintiff in error, in the above entitled cause, respectfully shows, that the above entitled cause is now pending in the United States Circuit Court of Appeals for the
495 Sixth Circuit, and that a judgment has therein been rendered on the 11th day — May affirming a judgment of the District Court of the United States, for the Eastern District of Michigan, Northern Division, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court

of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed him in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by
 496 said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

FRANK P. CHESBROUGH,
Plaintiff in Error.
 By THOMAS A. E. WEADOCK,
His Attorney.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff giving bond according to law in the sum of twenty-one thousand dollars.

ARTHUR C. DENISON,
Circuit Judge.

June 10, 1915.

Endorsed: No. 2634. U. S. Circuit Court of Appeals, Sixth Circuit. Frank P. Chesbrough, Plaintiff in Error, vs. Frank T. Woodworth, Defendant in Error. Petition for Writ of Error. Filed June 10, 1915. Wm. C. Cochran, Clerk. Thomas A. E. Weadock, Detroit, Att'y for Plaintiff in Error.

Assignment of Errors.

(Filed June 10, 1915.)

United States Circuit Court of Appeals, Sixth Circuit.

No. 2634.

FRANK P. CHESBROUGH, Plaintiff in Error,
 vs.
 FRANK T. WOODWORTH, Defendant in Error.

497 And now comes the plaintiff in error, Frank P. Chesbrough, (who by an order of severance brought error alone) by Thomas A. E. Weadock, his attorney, and says, that in the record and proceedings aforesaid of said United States Circuit Court of Appeals, for the Sixth Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error, in this, to wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States, for the Eastern District of Michigan, Northern Division, for

\$16,005.44 and costs of suit, entered May 11th, 1915, in favor of said defendant in error, and against said plaintiff in error.

Second. Said Circuit Court of Appeals erred in not reversing said judgment of the United States District Court aforesaid, and in not remanding said cause to said District Court for a new trial; said Court of Appeals having required the defendant in error to remit the sum of \$7,708.56 or submit to a new trial of said cause, which amount said defendant in error remitted, the judgment
498 being affirmed for the balance, \$16,005.44.

Third. Said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause, which was based on the overruling of defendant Chesbrough's demurrer to plaintiff's declaration which contained ten counts. The first, second, third, fourth, and fifth counts were based upon the publication in the Tribune, a Bay City newspaper, of statements made to the comptroller of the currency and attested by one or the other or both of the defendants, with the allegation that the reports were false, in that "loans and discounts" were reported at their face value, whereas said item contained papers that were worth much less than their face value.

It, also, charged the two defendants with having "knowingly violated" and "knowingly permitted and assented to the violation of the acts of Congress, etc., by permitting and assenting to the signing, attesting, and publication of the reports."

There was no allegation of any action or non-action, legal or illegal by the board of directors of the bank.

499 The first count was based on the report of February 6th, 1903, which it was alleged was attested by J. W. McGraw, E. B. Foss and James E. Davidson.

The second count was based on the report of April 9th, 1903, which was alleged to have been attested by James E. Davidson, J. W. McGraw and Frank P. Chesbrough.

The third count was based on the report of June 9th, 1903, which was alleged to have been attested by James Davidson, E. B. Foss and J. W. McGraw.

The fourth count was based on the report of Sept. 9th, 1903, which was alleged to have been attested by Frank P. Chesbrough, J. W. McGraw and James Davidson.

The fifth count was based on the report of November 17th, 1903, alleged to have been attested by Frank P. Chesbrough, J. W. McGraw and E. B. Foss.

The sixth, seventh and eighth counts claimed damages on account of the payment of three separate semi-annual dividends of five per cent each on the capital stock, in December 1902, and June and December 1903.

The dividend of 1902 was ordered at a special meeting held on December 1st, 1902, at which the defendant Chesbrough
500 was not present.

The dividend for June 1903 was ordered at the meeting of May 29th, 1903, and at that meeting defendant Chesbrough was not present.

The dividend for December 1903 was ordered at the meeting of November 27th, 1903, and defendant Chesbrough was present at that meeting. Judge Collins, attorney for the bank, advised payment of the dividends.

The ninth count was disposed of by the Court of Appeals in its opinion in the former case where it said, referring to excessive loans: "The Comptroller not having claimed a forfeiture, for this reason we can trace no damage flowing from this cause to the plaintiff. Plaintiff's loss was not in consequence of the fact of excess." 195 Fed. 882, 6th paragraph.

The tenth count charged that defendants violated the statutes of the United States, naming them relating to National Banks as particularly referred to and described in the preceding counts which were referred to, and made part of this count.

501 The main grounds of defendant's demurrer were that the only allegation against defendant was "attesting reports," etc., which showed that *before* each report was sworn to by the cashier, who, as the directors had a right to assume, was honest. The report of June 9th, 1903 was not attested by Chesbrough (third count). The report of November 17th, 1903, fifth count, was attested by Chesbrough.

Because defendant, under the sixth count, was not liable for an error in judgment about dividends and was not chargeable with what the books of the bank would show.

Because the ninth count stated no cause of action, directors not being liable for bad debts made by the cashier of the bank.

Because the right of action for excessive loans was in the bank, or its representative.

The bank was always a going concern, and allowed to do business by the comptroller of the currency, and was duly examined from time to time as required by law.

502 Because defendant Chesbrough, nor the two defendants complained of together could charge off any paper as bad, nor could they declare or prevent the payment of dividends, nor was it alleged that either defendant, or the board of seven directors knew or believed that the paper in question should be charged off.

Because it nowhere appears that said defendant acted negligently in signing said reports, nor that defendant and the board of directors of said bank did not employ honest and faithful agents, servants and employees; a competent and honest cashier, and honest bookkeepers; and nothing more is charged against them than attesting by their signatures certain reports prepared by the officers, agents, and employees of said bank; without knowledge, participation or direction of this defendant which reports have been sworn to by the cashier of said bank before their attestation. The Court of Appeals, affirming the District Court, in its first opinion, overruled the demurrer.

4th. The court erred in not sustaining the second, eighth, eleventh, and fortieth assignments of error based on the District

503 Court's receiving evidence in support of plaintiff's declaration, which alleged nothing against the board of directors of the old Second National Bank, as to violating or permitting by its officers any violation of the National Bank Act, plaintiff having based his action on U. S. Rev. Stat. 5239, and no neglect or breach of any duty as a board of directors, nor as individual directors, under the national banking laws.

5th. Said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause, based upon the admission in evidence by the District Court of the record of meetings of the Board of Directors at which defendant Chesbrough was not present, and had no knowledge of on account of his absence from Bay City from October 17th, 1903, to March 27th, 1903, during which time he was in Chicago, Illinois, on account of his wife's illness.

6th. Said Circuit Court of Appeals erred in not sustaining the 5th, 7th and 12th assignments of error on the record in said cause. These assignments were based on the admission in evidence of exhibits 25 to 47 inclusive over defendant's objection as to 504 incompetency, because they were never brought to his attention.

Exhibit 25, October 24th, 1902, was a letter from Andrews, the cashier, to Ridgeley, comptroller of the currency.

Exhibit 26, was a letter, October 24th, 1902, to Bump, President, at Washington, from Andrews, cashier, communicating a resolution of the board of directors that investigation would be made of the Maltby account.

Exhibit 27, May 13th, 1903, was a letter from Kane, acting comptroller, to Bump, President, relating to commercial paper contemplated by section 5200 R. S.

Exhibits 29 to 47 inclusive, all dated about October 31st, 1902, were letters from the Old Second National Bank to Michigan Central Railroad Company, Chicago Northwestern Railroad Company, Western Union Telegraph Company, American Tel. & Tel. Company, and various other parties, creditors of the Maltby Lumber Company, as to the state of the accounts between said companies and said Maltby Lumber Company, and various replies

505 thereto. The cashier said he "thought these letters were presented at the board meeting; he was not sure, but they were considered by the executive officers of the bank." It was not shown that any of these letters were brought to the knowledge or attention of defendant Chesbrough.

7th. Said Circuit Court of Appeals erred in not sustaining the 9th, 31st, 32nd, 112th, 112th^a, 113th and 114th assignments of error in the record of said case, which were based upon the exclusion by the District Court of the evidence of Frederick P. Browne, cashier of the First National Bank of Bay City, and the cashiers and directors of the other banks in Bay City, National and State, that it was the usual custom of all directors to attest reports of the condition of the respective banks for publication, relying upon the

sworn statements of the officers of the banks, who were honest men, that the statements were correct.

8th. Said Circuit Court of Appeals erred in not sustaining the tenth assignment of error, which was based upon the admission in evidence by the District Court of the directors' meeting of 506 May 31st, 1902, which declared a dividend out of the earnings of the past six months, over defendant Chesbrough's objection that it was incompetent against him, because he was not present at the meeting, and any evidence as to the payment of dividend was incompetent under the declaration.

9th. Said Circuit Court of Appeals erred in not sustaining the 11th assignment of error based upon the District Court receiving in evidence, minutes of the directors' meeting of June 6th, (at which there was no quorum) November 14th and 28th, 1902, at which meetings discounts were read and approved, but defendant Chesbrough was not present.

10th. Said Circuit Court of Appeals erred in not sustaining the 14th, 15th, 16th, 17th, 18th, 19th, 21st and 23rd assignments of error, each of which was based upon the ruling of the District Court in admitting in evidence the reports of the bank to the comptroller, as published in the newspaper; the same report being admitted several times, having been published more than once; the report of February 6th, 1903, not having been signed by Chesbrough. Each of the reports in question in the suit having been admitted to be cor- 507 rect according to the books of the bank on the trial of the case.

11th. Said Circuit Court of Appeals erred in not sustaining the 20th assignment of error, which was based upon the District Court permitting plaintiff's counsel to state to the jury during the trial.—

"There were \$220,000.00 of the Maltby indebtedness not charged off at the time the report of June 9th, 1903, was made, and this, with the knowledge of both defendants that such report would be published from the books of the bank."

12th. Said Circuit Court of Appeals erred in not sustaining the 22nd and 24th assignments of error which were based upon the District Court permitting the plaintiff to testify over seasonable objection that when he made the purchase on September 16th, 1903, of a certain amount of stock he relied upon the statement published in the Tribune that morning, and had no other knowledge of the then condition of the Old Second National Bank.

13th. Said Circuit Court of Appeals erred in not sustaining the 8th, 10th, 11th and 73rd assignments of error, each of which was based upon the rulings of the District Court concerning de- 508 fendant Chesbrough admitting in evidence the record of meetings of the Board of Directors, from which he was absent while in Chicago.

The 8th assignment was based on the admission of the proceedings of the Board of Directors of January 3rd, 1902, at which there was no quorum and at about which time Lewis was placed in Maltby's office by the bank in its interest.

The 10th assignment was based on the admission in evidence of

the record of a meeting on May 31st, 1902, at which a dividend was ordered, and at which meeting Chesbrough was not present, being absent in Chicago.

The 11th assignment was based upon receiving in evidence the minutes of the record of the directors' meetings of June 6th, November 14th and 28th, 1902. On June 6th there was no quorum, discounts were read, and on November 14th and 28th discounts were read and approved.

14th. Said Circuit Court of Appeals erred in not sustaining the 3rd, 10th, 88th and 116th assignments of error, each of which related to the subject of dividends.

509 The third assignment of error was based upon the District Court admitting evidence of payment of dividends over defendant's objection that the evidence was not admissible under the declaration.

The tenth assignment was based upon the fact that defendant Chesbrough was not present when the dividend was ordered on May 31st, 1902.

The eighty-eighth assignment was based upon the District Court admitting in evidence the dividends paid by the bank from June 5th, 1897 to November 27th, 1903.

The 116th assignment was based upon the District Court permitting plaintiff to answer the question whether he had received any dividend on his stock during the time he held it. This was objected to as immaterial and incompetent, and not proper redirect examination. The objection was overruled, and the witness answered, he received one semi-annual dividend of five percent.

15th. Said Circuit Court of Appeals erred in not sustaining the assignments of error relating to the subject of charging off paper, which assignments were the 25th, 26th, 28th, 32nd, 33rd, 68th, 97th, 99th and 120th.

The 25th assignment was based on the ruling of the District Court in which it followed the ruling of said Circuit Court of Appeals 510 in its first opinion on this case, that the real liability of the defendant was based upon the fact that paper in the bank had not been charged to profit and loss, and withdrawn from the live assets of the bank.

Defendant objected to this ruling that it was not competent under the declaration in the case, that neither of the defendants, nor both of them together could have charged off any paper, and neither of them ever opposed the charging off any paper.

No director of the bank during the time covered by the reports ever proposed charging off any of this paper,—the directors regarding the paper as secured and good, but their evidence on this point was excluded by the trial court.

The 26th assignment was based on the District Court receiving testimony in reference to the condition of the bank, or the proceeds of the securities taken by the Board of Directors in 1902-1903 from the Maltby Lumber Company, after the date of November 17th, 1903, 511 the date of the last published report.

The 28th assignment was based upon the District Court admitting plaintiff's testimony that some of the Maltby paper

was charged off in January 1905, and at different times after that date when plaintiff was a member of the board of directors.

The 32nd assignment was based on the admission, over objection, of the testimony of the witness, Andrews, as to the manner in which the reports for publication were made out, and the admission of the books of the bank showing the profit and loss account after November 1903.

The 33rd assignment was based on the District Court admitting in evidence the profit and loss account of the bank February 20th, 1905, Maltby Cedar Company successor of Maltby Lumber Company, \$135,000.00. This was objected to as incompetent occurring after the date of November 17th, 1903, the date of the last report.

The court admitted, over the like objection, witness' statement as to the profit and loss account,—“This book shows \$155,000.00.”

512 The 66th assignment was based on the trial court admitting in evidence the bank's daily statement of December 16, 1903, showing capital stock \$200,000.00—surplus \$75,000.00, undivided profits (net) \$34,911.01.

The 68th assignment was based upon the ruling of the District Court requiring the witness Andrews to answer the—

“Q. You stated that none of the directors made any effort to charge off any paper up to November 17th, 1903, I want to carry that down to December, 1903, was that true?”

This was objected to as immaterial, occurring after November 17th, 1903, which objection was overruled, and the witness answered.

“I don't recall that any effort was made or any discussion in the matter. Not to my knowledge was the effort made by Mr. McGraw or Mr. Chesbrough any more than anybody else.”

The 97th assignment was based on the court requiring defendant Chesbrough to answer, referring to a date after November 17th, 1903, and referring to the Maltby paper—“You did find out it was bad to the extent of \$225,000.” Defendant answered—“I wouldn't say I did.”

513 “Q. You charged off over \$200,000 paper as bad while you were in the bank?”

“A. I don't remember whether I was a director when that was charged off.”

The 99th assignment was based upon the court requiring defendant Chesbrough, on cross-examination, to answer the—

“Q. And you carried this same (Maltby) paper at its full face value during the entire year of 1904, on the books of the Old Second National Bank?”

This was objected to as incompetent, not proper cross-examination, and immaterial to the issue in this case, and the witness answered,—“I think we did.”

Defendant's counsel farther objected that what happened in 1904, can not be taken into consideration by the jury in this case. Whereupon counsel for plaintiff stated—“We are not claiming any probative force for what occurred in 1904” and plaintiff's other counsel said—“We do not claim any liability as to what he did in 1904; it simply goes to the credibility of the witness.”

Whereupon the court again overruled the objection and defendant's counsel stated, that "neither one nor two directors could charge off any paper. It was for the Board of Directors to do that." Which objection was overruled.

The 120th assignment was based on the District Court refusing to charge the jury, as requested, by the defendant's counsel at the close of the case, after a motion to direct a verdict for the defendant had been denied.

The 7th, 10th and 21st requests to charge submitted by defendant Chesbrough and refused by the court, were as follows:

7th. "I charge you as a matter of law that the comptroller's request for such reports to be made by the bank, naming a past date upon which the report is to be made, imperatively commands and requires the officers of the bank to report the condition of the bank, as shown by the bank's books, on the date named by the comptroller, and that any change in the report from the condition of the bank as shown by the books, would constitute a false report and would render each officer of the bank knowingly participating therein, liable to the penalties provided in said Act for making a false report."

10th. "I charge you that no absolute duty devolves upon the directors of the bank to charge off any part or portion of the loans and discounts, because the directors, or any of them, believe that a part or portion of such loans and discounts are uncollectible, as such board has an honest discretion as to the amount of paper which it may carry after it has become presently uncollectible, and that in order for you to find that the board of directors neglected its duty to the plaintiff in failing to charge off any part or portion of the loans and discounts held by this bank, known as the Maltby Lumber Company paper, you must further find from the evidence in this cause that the Board of Directors, as a board knowingly acted dishonestly, and in bad faith, in carrying the whole of this Maltby paper, as live paper, among the loans and discounts of the bank at its par value."

21st. "I charge you that as appears from the evidence, the defendant, Chesbrough signed but two reports: one of April 9th, 1903, and the other of November 17th, 1903, and that no other of the reports complained of was made by him as a director; and I charge you that under the evidence in this case, you would have no right to find the verdict against the defendant, Chesbrough for and on account of the making of the reports by any other of the directors, or for and on account of any knowledge possessed by any other of the directors, except the said Chesbrough himself at the time of the making of these two reports."

16th. Said Circuit Court of Appeals erred in not sustaining the 131st assignment of error which was based upon the District Court charging the jury as follows:

"Plaintiff was not compelled to sue all the directors who signed the reports, or who served during the years complained of, he had a right to select the two defendants and sue them alone if he desired."

17th. Said Circuit Court of Appeals erred in not sustaining the

516 69th, 78th, 79th, 81st to 87th inclusive, 104th, 105th, 106th, 107th and 130th assignments of error, each of which was based upon the exclusion by the District Court of any evidence on the part of the directors other than the two defendants, that they each believed the Maltby line of discounts and advances made on bills of lading were good, secured, and should not have been charged off prior to November 18th, 1903. (Of the seven directors during the time in question, at the time of the trial, Bump and Cooke were dead, James Davidson was totally deaf, and James E. Davidson, Edgar B. Foss, Joseph W. McGraw and Frank P. Chesbrough were sworn for defendants).

The 69th assignment was based on the court's exclusion of evidence that the Maltby Lumber Company loan was secured, and the directors considered the security good and worth every dollar of it.

The 78th assignment was based on the District Court's refusal to receive evidence that the bank lost no money, because the Maltby drafts on railway companies, etc., were not forwarded for acceptance.

The 79th assignment was based on the trial court's refusal to permit director James E. Davidson to state what he did about
517 signing the report of Sept. 9th, 1903.

The 81st, 82nd and 83rd were all based on the exclusion by the District Court of evidence offered by defendants of talk with Bump, the president of the bank, about the Maltby line by the directors and his assurance to them with reference to the line, and the fact that James E. Davidson, after the receipt of securities in 1902 and 1903, regarded the Maltby line as secured.

The 84th assignment was based on the District Court's refusal to permit the defendant Chesbrough to answer whether he believed the loans and discounts on hand April 9th, 1903, were good for the amount listed in the statement.

The 85th assignment was based on the trial court's refusal to allow defendant to show that the other directors relied on Bump, the president of the bank, with reference to this paper.

The 86th and 87th assignments were based on the Districts Court's refusal to permit the defendant Chesbrough to testify that in April 1903 he regarded the paper in question as secured, and that when he attested the two reports, which included the Maltby paper, he
regarded that paper as good at that time.

518 The 104th assignment was based on the District Court's refusal to allow director Foss to answer why he attested the reports to the comptroller published in 1903.

The 105th assignment was based on the court excluding the testimony of director Foss that when he signed said reports, he believed the reports to be true, and a correct transcript of the books of the bank.

The 106th assignment was based on the refusal of the District Court to permit director Foss to say what information he had from President Bump about this Maltby paper on or about May 1st, 1902, and also refused to allow him to state how he regarded the Maltby line of discounts at the time he signed the reports.

The 107th assignment was based on the refusal of the District

Court to permit director Fors to State whether during 1903 he regarded the Maltby line as secure; that he relied upon the information given him by Bump, and that his judgment, and that of the board in January 1903 was that the Maltby line was secure.

519 The 130th assignment of error was based upon the District Court charging the jury, as follows: "You are not concerned in this case with what Andrews knew or believed, or what any of the directors knew or believed, except the defendants themselves."

18th. Said Circuit Court of Appeals erred in not sustaining the 43rd and 93rd assignments of error, each of which was based upon the District Court admitting testimony of the witness James M. Lewis, who, about January 1903, was put in Maltby's office by the bank, to state that his connection with the bank was supposed to be secret, and in requiring the defendant Chesbrough to answer whether "Lewis was there representing the bank, but ostensibly as an employe of the Maltby Lumber Company." To which defendant Chesbrough replied—"I knew that Lewis was in the office."

19th. Said Circuit Court of Appeals erred in not sustaining the 45th, 46th, 47th, 49th and 112th assignments of error, each of which related to the admission of testimony from the witness Lewis, who had no knowledge of the Maltby Cedar Pole, tie, etc. business, or how it should be conducted, to testify that in his judgment
520 he realized from and handled the bank's securities as well as it could be done.

20th. The Circuit Court of Appeals erred in refusing to sustain the 64th, 118th and 119th assignments of error; the 64th being based upon the refusal of the District Court to direct a verdict in favor of the defendant Chesbrough at the end of the plaintiff's case; because, plaintiff could not maintain an action against two of seven directors, because nothing was charged or proved against defendant, except the signing and attesting the publications of the reports set forth, which were correct according to the books of the bank; had been sworn to by the cashier of the bank who was honest and faithful;—because the report of September 9th was not attested by defendant Chesbrough—because two directors could not declare a dividend nor prevent one being declared;—because the directors were not responsible for bad debts made by the president or cashier of the bank, or which turned out years later to be bad;—because defendant Chesbrough nor both defendants together could not charge off any paper of the bank, nor was it alleged or proved that either of

521 the defendants prevented any paper being charged off, or that any one of the directors of the bank, during the time in question, believed that any of the paper should be charged off;—because the employes of the bank were honest and faithful, and the directors had a right to rely upon the accuracy and correctness of the books of the bank, and were not charged with knowledge of what appeared thereon or in the correspondence of the bank:

For the reason that it is shown that the defendant Chesbrough was not present at the meetings of the directors, which were held on April 4, 11, 18, and 25th, 1902, nor at the meetings of May 2, May 16, and May 31st, 1902. Neither was he present at the meeting

held June 27th, nor July 11, nor 18, nor 25, nor August 1, 8, 15, or 29; that he was not at the meeting held September 12 nor 19 nor 26; that he was not there on the 10th day of October, 1902, nor at the meetings held on the 24th or 31st of October 1902, nor was he present at the meetings held November 7, 28, December 4, 12, 19, nor 26th. Neither was he present at the meetings held January 2, 9, 16, 23, nor 30th of January, 1903. Nor at the meetings held on February 6, 13, 20, 27, 1903; nor at the meetings of March 6, 13, nor 20, 1903; nor at the meetings of April 17, 1903, nor May 1, 1903, nor May 29, nor June 12, 26, nor July 3, nor July 10, 17, 24, 31, August 8, 14, 21, 28, nor at the meeting- of October 2, 9, 16, and 23, 1903.

The 118th assignment was based on the refusal of the court to direct a verdict for defendant Chesbrough at the conclusion of the case, the right to make that motion at that time having been reserved, and no claim or allegation being made in the declaration charging defendant Chesbrough, or the board of directors, with failing to write off any portion of the loans and discounts of the bank and for the reasons above stated.

The 119th assignment was based on the refusal of the District Court to grant defendant's motion to strike out of the case, anything in the case relating to anything after November 17th, 1903 (with the exception of the two reports signed by Woodworth of January 11th and May 29th, 1905) for the reason that the second opinion of the Court of Appeals, paragraph 2, holds, that the defendants' liability cannot be estimated as of any date later than November 17th,

1903, their latest act, which was constructively a representation of fact by them to the plaintiff on that date, and therefore, the stock purchase of December 16th, 1903, and all testimony in the case relating to a date after November 17th, 1903, should be stricken out.

21st. Said Circuit Court of Appeals erred in overruling the 121st to 131st assignments of error inclusive; each of which assignments related to specific portions of the charge of the court to the jury.

The 121st assignment was based on the following portion of said charge.

"It is claimed that all of these violations of the statute were part of a general design on the part of the defendants to deceive the public. This part of plaintiff's claim stated in the tenth count therefore treats all of the defendants' acts as part of one general design to deceive the public, and treats all of plaintiff's purchases and damages as resulting from this design, and recoverable as a whole."

The 122nd assignment was based on the following portion of said charge:

"In addition to the tenth count of the plaintiff's declaration, which is referred to there are the first, second, fourth, and fifth counts, which rely respectively on the reports of February 6, April 9, September 9, and November 17th, 1903, and treat each purchase of stock by plaintiff as a separate cause of action resulting from the publication of the preceding report. These counts, therefore, enable you to consider each report and each purchase

by itself, if you think they should be so considered. Plaintiff does not claim, and is not required to prove that the defendants actually signed their names on the copies of the report- which were sent to the printer, or that defendant, Chesbrough, signed all of the reports, or that his name was printed on all of them."

The 123rd assignment was based on the following portion of said charge:

"The underlying fault, if any such was committed in this case, was in the failure of the board of directors of the bank to write off such part or portion of the loans and discounts as they then knew to be bad, if any."

The 124th assignment was based on the following portion of said charge:

"If the defendants knew this, and it is my memory of the testimony that they both admitted that they did, it is not important whether both of them or either of them attested each report."

The 125th assignment was based on the following portion of said charge:

"For these reasons the act upon which liability depends is not the signing of the report itself, but the failure to make reasonable personal efforts to induce the board to charge off assets which have become worthless, if assets have actually at that time become worthless, and are at that time known to said director to be worthless."

525 The 126th assignment was based on the following portion of said charge:

"It is not necessary for the plaintiff to prove any actual conscious design or intention on the part of the defendants to mislead or deceive the plaintiff."

The 127th assignment was based on the following portion of said charge—referring to the reports of January 11th and May 29th, 1905.

"The mere fact that plaintiff signed the 1905 reports or either of them does not prevent his recovery, and does not excuse the defendants if they are otherwise liable."

The reports referred to were reports to the comptroller made January 11th and May 29th, 1905, when loans and discounts included over \$140,000.00 of the Maltby paper.

The 128th assignment was based on the following portion of said charge:

"If plaintiff relied upon the published reports, it makes no difference whether he did or did not make additional investigation. His negligence, if any, is not a defense in an action of this kind."

The 129th assignment of error was based on the following portion of said charge:

"It is not necessary for plaintiff to show that defendants actually derived and benefit from the claimed violation of the statute.
526 Plaintiff's right to recover, if any, depends upon his loss, and not upon their gain."

The 130th assignment of error was based on the following portion of said charge:

"You are not concerned in this case with what Mr. Andrews knew or believed or what any of the directors knew or believed, except the defendants themselves."

The 131st assignment of error was based on the following portion of said charge:

"Plaintiff was not compelled to sue all of the directors who signed the reports or who served during the years complained of, but he had a right to select the two defendants, and to sue them alone if he desired."

22nd. Said Circuit Court of Appeals erred in not sustaining the 63rd and 115th assignments of error, each of which was based on the refusal of the trial court to permit the plaintiff to be cross-examined under the Michigan Statutes, permitting cross-examination of a plaintiff, as a witness, without making him the witness for the defendant, which ruling defendant Chesbrough contends was contrary to the Michigan Statute, Public Acts 1909, No. 307, page 753, Howell's Michigan Statutes, 12865:

"Hereafter in any suit or proceeding in any court at law or equity in this state, either party, if he shall call as a witness in his behalf the opposite party, employe or agent of said opposite party, or any person, who, at the time of the happening of the transaction out of which such suit or proceeding grew, was an employe or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling or examining such witness shall not be bound to accept such answers as true."

And, also, contrary to the Rev. Statutes of the United States, Sec. 558 as amended in 1906, and re-enacted in the Judiciary Act of 1911, U. S. Com. Stat. 1911, p. 271.

23rd. Said Circuit Court of Appeals erred in not sustaining the 53rd and 54th assignments of error, each of which was based on rulings of the District Court excluding testimony for defendant that the directors of the First National Bank, of Bay City, were attempting, prior to November 17th, 1903, to acquire the stock of the Old Second National Bank for the purpose of consolidating the banks, and that plaintiff Woodworth was acting with them in the purchase of the stock.

24th. Said Circuit Court of Appeals erred in not sustaining the 77th assignment of error which was based on the action of the District Court in receiving evidence of what was done in the disposition of the securities by the bank, their sale and management, and the loss to the bank which accrued during the five or six years after November 17th, 1903, as a "history of the transaction."

25th. Said Circuit Court of Appeals erred in not sustaining the 103rd assignment of error, which was based on the refusal of the District Court to permit defendant's witness, director Edgar B. Foss, to testify that the employes, bookkeepers, and tellers of the bank in 1902 and 1903 were honest and competent.

26th. Said Circuit Court of Appeals erred in not sustaining the 34th, 35th and 62nd assignments of error.

The 34th and 35th assignments were based on the admission in evidence of the by-laws of the Old Second National Bank, and the 62nd assignment being based on the admission in evidence by the

529 District Court of the daily statement of the bank of the dates when dividends were voted, and also, the dates when dividends were payable, namely, May 29th, June 1st, November 27th and December 1st, 1903, which were seasonably objected to as incompetent; defendant Chesbrough not being bound by the books of the bank, nor action in reference to dividends in which he took no part, and the dividends having been paid in good faith on advice of counsel.

27th. Said Circuit Court of Appeals erred in not sustaining the 58th assignment of error, which was based upon the action of the District Court in admitting in evidence the sales of stock that the Second National Bank made by Jennie McGraw Curtis, sister of defendant Joseph W. McGraw, Joseph W. McGraw, Aaron Chesbrough, and the defendant Frank P. Chesbrough.

28th. Said Circuit Court of Appeals erred in not sustaining the 36th, 37th, 40th, 51st, 74th and 77th assignments of error, each of which was based on the rulings of the District Court with reference to the witness Alvin Maltby.

The 36th assignment was based on a ruling admitting evidence of a loss of the bank made on Mosher paper (through Maltby) several years before 1903.

530 The 37th assignment was based on the District Court admitting evidence as to whether the Maltby Lumber Company had any commercial rating in 1902 and 1903.

The 40th assignment was based on the court receiving in evidence exhibits 29 to 39 inclusive, which were letters passing to and from the cashier of the bank to third parties as to the state of their accounts with Maltby Lumber Company, none of which were shown to have been brought to the attention of defendant Chesbrough.

The 51st assignment was based on a ruling of the District Court admitting hearsay evidence from James M. Lewis as to tax titles against the Maltby lands, and his manner of dealing with the lands, they being part of the security held by the bank.

The 74th assignment was based on the ruling of the District Court in permitting an inquiry as to whether Alvin Maltby had gone through bankruptcy prior to the formation of the Maltby Lumber Company.

77th assignment. Cashier Andrews for the defendants was testifying in regard to the bundle of letters which he produced. 531 and which came from the files of the Old Second National Bank, and were received without objection, whereupon plaintiff's counsel said:

"We take the position of making no objection as to the history of the transaction, but we object to them as substantive evidence of the good faith of the defendant. Defendant's counsel took exception to this statement, but the Court said nothing."

All the letters were acceptances by Maltby customers of the assignment of the bills of lading and accounts to the bank for the products sold by Maltby.

Wherefore, the said Frank P. Chesbrough, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States District Court for the Eastern District of Michigan, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this honorable court, to the

THOMAS A. E. WEADOCK,

Attorney for Plaintiff in Error.

Endorsed: No. 2634. U. S. Circuit Court of Appeals, Sixth Circuit. Frank P. Chesbrough, Plaintiff in Error vs. Frank T. Woodworth, Defendant in Error. Assignment of Errors. Filed June 10, 1915. Wm. C. Cochran, Clerk. Thomas A. E. Weadock, Att'y for P'ff in Error.

Affidavit of Thomas A. E. Weadock.

(Filed June 10, 1915.)

Supreme Court of the United States.

FRANK P. CHESBROUGH, Plaintiff in Error,

vs.

FRANK T. WOODWORTH, Defendant in Error.

STATE OF MICHIGAN,

Wayne County, ss:

Thomas A. E. Weadock, of Detroit, in said county, being duly sworn, on his oath says, that he is the attorney for the above named plaintiff in error, and has been such since the beginning of the litigation involved in this suit, and is entirely familiar therewith, and that the amount in controversy in this suit is the amount of the judgment affirmed against plaintiff in error by the United States Circuit Court of Appeals for the Sixth Circuit; namely, the sum of Sixteen Thousand, Five Dollars and Forty-four cents (\$16,005.44), exclusive of interest and costs.

THOMAS A. E. WEADOCK.

Subscribed and sworn to before me, this 8th day of June, A. D. 1915.

[SEAL.]

MARTHA E. SPENCER,

Notary Public in and for Said County.

My Commission expires April 9, 1918.

Endorsed: C. C. A. No. 2634. United States Supreme Court. Frank P. Chesbrough, Plaintiff in Error vs. Frank T. Woodworth, Defendant in Error. Affidavit that amount in dispute exceeds \$1,000. Filed June 10, 1915. Wm. C. Cochran, Clerk. Thomas A. E. Weadock of Detroit, Att'y for P'ff in Error.

534

Superædeas Bond.

(Filed June 10, 1915.)

Know all men by these presents, that Frank P. Chesbrough, as principal, and United States Fidelity & Guaranty Company, a corporation, formed and existing under the laws of the State of Maryland, as surety, are held and firmly bound unto Frank T. Woodworth in the full and just sum of Twenty-One Thousand (\$21,000.00) Dollars to be paid to the said Frank T. Woodworth, his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, and said Frank P. Chesbrough binds his heirs, executors and administrators, said United States Fidelity & Guaranty Company binds its successor jointly and severally, by these presents. Sealed with our seals and dated this twenty-sixth day of May A. D. 1915, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately in the United States Circuit Court of Appeals for the Sixth Circuit, in a suit depending in said court, between Frank

P. Chesbrough plaintiff in error, and Frank T. Woodworth, 535 defendant in error, a judgment was rendered against the said

Frank P. Chesbrough, and the said Frank P. Chesbrough having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Frank T. Woodworth citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the tenth day of July next.

Now the condition of the above obligation is such, that if the said Frank P. Chesbrough shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void else to remain in full force and virtue.

FRANK P. CHESBROUGH, [L. s.]
THE UNITED STATES FIDELITY &
GUARANTY CO.,

By WM. H. MCBRYAN,

Its Attorney in Fact. [SEAL.]

Sealed and delivered in the presence of
THOMAS A. E. WEADOCK,
B. G. EGERTON.

Approved by
ARTHUR C. DENISON,
Circuit Judge.

June 10, 1915.

536 Endorsed: 2634. Frank P. Chesbrough, P'ff in Error vs. Frank T. Woodworth, Defendant in Error. Supersedeas Bond. Filed June 10, 1915. Wm. C. Cochran, Clerk. Thomas A. E. Weadock, Attorney for Plaintiff in Error.

(Letter Attached to Bond.)

Gillett & Clark, Attorneys at Law, 437-440 Shearer Bldg., Bay City, Mich.

H. M. Gillett.

Edward S. Clark.

Woodworth Case.

June 1, 1915.

Mr. T. A. E. Weadock, Hammond Bldg., Detroit, Michigan.

DEAR SIR: I have received, as anticipated, a favorable report from the Commissioner of Insurance. Mr. Chesbrough's proposed bond signed by the United States Fidelity & Guaranty Company of Maryland, by William H. McBryan, its attorney in fact, is therefore satisfactory.

Yours very truly,

E. S. CLARK.

C-B.

537 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Sixth Circuit before you, or some of you, between Frank P. Chesbrough, Plaintiff in Error and Frank T. Woodworth, Defendant in Error, a manifest error hath happened, to the great damage of the said Frank P. Chesbrough Plaintiff in Error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the 10th day of June, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
*Clerk of the United States Circuit Court of
 Appeals for the Sixth Circuit,*
 By ARTHUR B. MUSSMAN, *Deputy.*

Allowed by
 ARTHUR C. DENISON,
United States Circuit Judge, Sixth Circuit.

June 10, 1915.

Filed Jun- 10, 1915. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

In pursuance of the command of the within writ of error, I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do herewith transmit, under the seal of said court, a true, full and complete copy of the record, the assignment of errors and of all proceedings of said court in the cause and matter in said writ of error stated, to the Supreme Court of the United States, together with said writ of error and the citation to said defendant in error.

Witness my official signature and the seal of said Court, at Cincinnati, Ohio, in said Circuit this 25th day of June, A. D. 1915, and in the 139th year of the Independence of the United States of America.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN
*Clerk United States Circuit Court
 of Appeals for the Sixth Circuit.*

538 UNITED STATES OF AMERICA, 88:

To Frank T. Woodworth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein Frank P. Chesbrough is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur C. Denison, United States Circuit

Judge for the Sixth Circuit, this tenth day of June, in the year of our Lord one thousand nine hundred and fifteen.

ARTHUR C. DENISON,
United States Circuit Judge for the Sixth Circuit.

June 14, 1915.

I hereby accept service of the above citation.

FRANK T. WOODWORTH,
By EDWARD S. CLARK,
His Attorney.

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Cross-Petition.

(Filed June 15, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

FRANK P. CHESBROUGH, Plaintiff in Error.

vs.

FRANK T. WOODWORTH, Defendant in Error.

Petition for Writ of Error.

Your petitioner, Frank T. Woodworth, defendant in error, in the above entitled cause respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the 6th Circuit, and that a judgment has therein been rendered on the 11th day of May 1915 affirming, in part, and reversing in part, a judgment of the District Court of the United States for the Eastern District of Michigan, Northern Division. That the matter in controversy in said suit exceeds one thousand (\$1000.00) dollars besides costs and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different states, and that this cause does not
540 arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

Therefore your petitioner would respectfully pray that a writ of error be allowed him in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States, in order that the errors involved in the partial reversal of the judgment aforesaid and complained of in the assignment of errors herewith filed

by said defendant in error, may be reviewed, and if error be found corrected according to the laws and customs of the United States.

FRANK T. WOODWORTH,

Plaintiff in Error,

By EDWARD S. CLARK,

JOHN C. WEADOCK,

His Attorneys.

GILLETT & CLARK,

Of Counsel.

The foregoing petition is granted, and writ of error allowed as prayed for upon defendant in error giving bond according to law in the sum of Five Hundred (\$500.00) dollars. This allowance is made with doubts, but in order that petitioner's right thereto may be put in form for determination by the Supreme Court.

ARTHUR C. DENISON,

Circuit Judge.

June 15, 1915.

Endorsement: No, 2634. United States Circuit Court of Appeals for the Sixth Circuit. Frank P. Chesbrough, Plaintiff in Error, vs. Frank T. Woodworth, Defendant in Error. Cross Petition of Frank T. Woodworth for Writ of Error. Filed June 15, 1915. Wm. C. Cochran, Clerk.

542

Assignment of Errors.

(Filed June 15, 1915.)

United States Circuit Court of Appeals for the Sixth Circuit.

FRANK P. CHESBROUGH, Plaintiff in Error,

vs.

FRANK T. WOODWORTH, Defendant in Error.

Now comes the defendant in error Frank T. Woodworth, by Edward S. Clark and John C. Weadock, his attorneys, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Sixth Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said defendant in error in this, to wit:

First. Said Circuit Court of Appeals erred in not entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Michigan, Northern Division, for the full sum of Twenty-three thousand, seven hundred fourteen (\$23,714.00) dollars and costs of suit, that being the amount for which judgment was entered in the District Court aforesaid.

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Second, Said Circuit Court of Appeals erred in requiring the defendant in error to remit the sum of seven thousand seven hundred and eight dollars and fifty-six cents (\$7,708.56), or to submit to a new trial of said cause.

Third, Said Circuit Court of Appeals erred in holding that the verdict rendered by the jury in the District Court of the United States for the Eastern District of Michigan, Northern Division, was excessive.

Fourth, The said Circuit Court of Appeals erred in holding that the McGraw report, so-called, being exhibit 223, offered by plaintiff in error in the District Court aforesaid was legally insufficient to support the verdict rendered by the jury in said court.

Fifth, The said Circuit Court of Appeals erred in holding that the act of the defendant in error in signing a certain report of the condition of the Old Second National Bank should be given any effect in considering the degree or nature of the proof required to justify the submission to the jury of the entire claim made by the defendant in error. The report aforesaid was offered in evidence in the District Court by plaintiff in error as Exhibit 169.

Sixth, The said Circuit Court of Appeals erred in holding that in order to support the verdict of the jury rendered in the District Court aforesaid, the said defendant in error should be required to show affirmatively that the plaintiff in error, at the time of the grievances complained of in the declaration, had actual knowledge that the loss suffered by the Old Second National Bank by reason of the discounts then and theretofore made for the Maltby Lumber Company would amount to the full sum of Two hundred thousand dollars used as a basis of the verdict rendered by the jury.

Seventh, The said Circuit Court of Appeals erred in awarding and rendering judgment against the defendant in error and in favor of the plaintiff in error, for the costs of suit in the said Circuit Court of Appeals.

Wherefore, the said Frank T. Woodworth, defendant in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the defendant in error, the said judgment of the said United States Circuit Court of Appeals be reversed annulled and for naught esteemed, and that said cause be remanded to the United States District Court for the Eastern District of Michigan, Northern Division, with instructions to affirm and reinstate the judgment entered in the said District Court on November 22, 1912, for the full sum of twenty-three thousand, seven hundred fourteen (\$23,714.00) dollars and costs of suit, and for such further proceedings in said cause as may be determined upon by this honorable court to the end that justice may be done in the premises.

EDWARD S. CLARK,
JOHN C. WEADOCK,

Attorneys for Defendant in Error.

GILLETT & CLARK,
Of Counsel.

Endorsement: No. 2634. United States Circuit Court of Appeals for the Sixth Circuit. Frank P. Chesbrough, Plaintiff in Error, vs. Frank T. Woodworth, Defendant in Error. Assignment of Errors by Cross Petitioner Frank T. Woodworth. Filed June 15, 1915. W. C. Cochran, Clerk.

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Bond.

(Filed June 15, 1915.)

Know all men by these presents, that we, Frank T. Woodworth, as principal, and Hezekiah M. Gillett and Edward S. Clark, as sureties, are held and firmly bound unto Frank P. Chesbrough in the full and just sum of five hundred (\$500.00) dollars, to be paid to the said Frank P. Chesbrough, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 12th day of June in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a United States Circuit Court of Appeals for the Sixth Circuit, in a suit depending in said court, between Frank P. Chesbrough plaintiff in error, and Frank T. Woodworth, defendant in error, a judgment was rendered in part against the said Frank T. Woodworth, and the said Frank T. Woodworth having obtained writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and
547 a citation directed to the said Frank P. Chesbrough, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said Frank T. Woodworth, shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANK T. WOODWORTH.	[SEAL.]
HEZEKIAH M. GILLETT.	[SEAL.]
EDWARD S. CLARK.	[SEAL.]

Sealed and delivered in the presence of

LAURA M. BRAUN.
JESSIE THOMPSON.

Approved June 15, 1915, by

ARTHUR C. DENISON,
United States Circuit Judge for the Sixth Circuit.

STATE AND EASTERN DISTRICT OF MICHIGAN,
County of Bay, ss:

Hezekiah M. Gillett and Edward S. Clark, the sureties above named, each for himself makes oath that he is worth the penalty in the above bond over and above all debts, liabilities and exemptions.

HEZEKIAH M. GILLETT.
EDWARD S. CLARK .

Subscribed and sworn to before me this 12th day of June, 1915.

[SEAL.] LAURA M. BRAUN,
Notary Public, Bay County, Mich.

My commission expires August 12, 1915.

Endorsement. No. 2634. United States Circuit Court of Appeals for the Sixth Circuit. Frank P. Chesbrough, Plaintiff in Error vs. Frank T. Woodworth, Defendant in Error. Bond of Frank T. Woodworth, Cross Petitioner for Writ of Error. Filed June 15, 1915. Wm. C. Cochran, Clerk.

549 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Sixth Circuit before you, or some of you, between Frank P. Chesbrough, Plaintiff in Error and Frank T. Woodworth, Defendant in Error, a manifest error hath happened, to the great damage of the said Frank T. Woodworth as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the 15th day of June, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

W. C. COCHRAN,
*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

Allowed by

ARTHUR C. DENISON,
United States Circuit Judge, Sixth Circuit.

(See allowance at foot of petition.)

Filed Jun. 15, 1915. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

In pursuance of the command of the within writ of error, I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do herewith transmit, under the seal of said court, a true, full and complete copy of the record, the assignment of errors and of all proceedings of said court in the cause and matter in said writ of error stated, to the Supreme Court of the United States, together with said writ of error and the citation to said defendant in error.

Witness my official signature and the seal of said Court, at Cincinnati, Ohio, in said Circuit this 25th day of June, A. D. 1915 and in the 139th year of the Independence of the United States of America.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
*Clerk United States Circuit Court
of Appeals for the Sixth Circuit.*

550 UNITED STATES OF AMERICA, ss:

To Frank P. Chesbrough, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein Frank T. Woodworth, (the defendant in error, in a writ of error issued by you herein) is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur C. Denison, United States Circuit

Judge for the Sixth Circuit, this 15th day of June, in the year of our Lord one thousand nine hundred and fifteen.

ARTHUR C. DENISON,

United States Circuit Judge for the Sixth Circuit.

June 17th, 1915.

Personal service of this citation acknowledged.

FRANK P. CHESBROUGH,

By THOMAS A. E. WEADOCK,

His Att'y.

551 United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record, assignments of error and all proceedings in the case of Frank P. Chesbrough vs. Frank T. Woodworth No. 2634, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 25th day of June, A. D. 1915.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,

*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

552 Supreme Court of the United States, October Term 1915.

Docket No. 536.

FRANK P. CHESBROUGH, Plaintiff in Error,

vs.

FRANK T. WOODWORTH, Defendant in Error.

*Designation by Plaintiff in Error of Portions of Record Which
Should be Printed.*

To Edward S. Clark, Attorney for defendant in error:

Please take notice that the following is a statement of the errors upon which the plaintiff in error intends to rely in this cause, the same being a copy of the assignment of errors filed in the United States Circuit Court of Appeals for the Sixth Circuit, and duly certified to this court:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States, for the Eastern District of Michigan, Northern Division, for \$16,-

005.44 and costs of suit, entered May 11th, 1915, in favor of said defendant in error, and against said plaintiff in error.

553 Second. Said Circuit Court of Appeals erred in not reversing said judgment of the United States District Court aforesaid, and in not remanding said cause to said District Court for a new trial; said Court of Appeals having required the defendant in error to remit the sum of \$7,708.56 or submit to a new trial of said cause, which amount said defendant in error remitted, the judgment being affirmed for the balance \$16,005.44.

Third. Said Circuit Court of Appeals erred in not sustaining the first assignment of error upon the record in said cause, which was based on the overruling of defendant Chesbrough's demurrer to plaintiff's declaration which contained ten counts. The first, second, third, fourth, and fifth counts were based upon the publication in the Tribune, a Bay City newspaper, of statements made to the comptroller of the currency and attested by one or the other or both of the defendants, with the allegation that the reports were false, in that "loans and discounts" were reported at their face value, whereas said item contained papers that were worth much less than their face value.

It, also, charged the two defendants with having "knowingly violated" and "knowingly permitted and assented to the violation of the acts of Congress, etc., by permitting and assenting to the signing, attesting, and publication of the reports."

There was no allegation of any action or non-action, legal or illegal by the board of directors of the bank.

The first count was based on the report of February 6th, 1903, which it was alleged was attested by J. W. McGraw, E. B. Foss, and James E. Davidson.

The second count was based on the report of April 9th, 1903, which was alleged to have been attested by James E. Davidson, J. W. McGraw and Frank P. Chesbrough.

The third count was based on the report of June 9th, 1903, which was alleged to have been attested by James Davidson, E. B. Foss and J. W. McGraw.

The fourth count was based on the report of Sept. 9, 1903, which was alleged to have been attested by Frank P. Chesbrough, J. W. McGraw and James Davidson.

The fifth count was based on the report of November 17th, 1903, alleged to have been attested by Frank P. Chesbrough, J. W. McGraw, and E. B. Foss.

The sixth, seventh, and eighth counts claimed damages on account of the payment of three separate semi-annual dividends of five per cent. each on the capital stock, in December 1902, and June and December 1903.

554 The dividend of 1902 was ordered at a special meeting held on December 1st, 1902, at which the defendant Chesbrough was not present.

The dividend for June 1903 was ordered at the meeting of May 29th, 1903, and at that meeting defendant Chesbrough was not present.

The dividend for December 1903, was ordered at the meeting of November 27th, 1903, and defendant Chesbrough was present at that meeting. Judge Collins, attorney for the bank, advised payment of the dividends.

The ninth count was disposed of by the Court of Appeals in its opinion in the former case where it said, referring to excessive loans: "The comptroller not having claimed a forfeiture, for this reason we can trace no damage flowing from this cause to the plaintiff. Plaintiff's loss was not in consequence of the fact of excess". 195 Fed. 882, 6th paragraph.

The tenth count charged that defendants violated the statutes of the United States, naming them, relating to the National Banks as particularly referred to and described in the preceding counts which were referred to, and made part of this count.

The main grounds of defendant's demurrer were that the only allegation against defendant was "attesting reports", etc., which showed that before that each report was sworn to by the cashier, who, as the directors had a right to assume, was honest. The report of June 9th, 1903 was not attested by Chesbrough (third count). The report of November 17th, 1903, fifth count, was attested by Chesbrough.

Because defendant, under the sixth count, was not liable for an error in judgment about dividends, and was not chargeable with what the books of the bank would show.

Because the ninth count stated no cause of action, directors not being liable for bad debts made by the cashier of the bank.

Because the right of action for excessive loans was in the bank, or its representative.

The bank was always a going concern, and allowed to do business by the comptroller of the currency, and was duly examined from time to time as required by law.

Because defendant Chesbrough, nor the two defendants complained of together could charge off any paper as bad, nor could they declare or prevent the payment of dividends, nor was it alleged that either defendant, or the board of seven directors knew or believed that the paper in question should be charged off.

Because it nowhere appears that said defendant acted negligently in signing said reports, nor that defendant and the board of directors of said bank did not employ honest and faithful agents, servants and employees; a competent and honest cashier, and honest bookkeepers; and nothing more is charged against them than attesting by their signatures certain reports prepared by the officers, agents, and employees of said bank; without knowledge, participation or direction of this defendant which reports had been sworn to by the cashier of said bank before their attestation. The Court of Appeals, affirming the District Court, in its first opinion, overruled the demurrer.

4th The Court erred in not sustaining the second, eighth, eleventh, and fortieth assignments of error based on the District Court's receiving evidence in support of plaintiff's declaration, which alleged nothing against the board of directors of the Old Second National

Bank, as to violating or permitting by its officers any violation of the National Bank Act, plaintiff having based his action on U. S. Rev. Stat. 5239, and no neglect or breach of any duty as a board of directors, nor as individual directors, under the national banking laws.

5th. Said Circuit Court of Appeals erred in not sustaining the fourth assignment of error upon the record in said cause, based upon the admission in evidence by the District Court of the record of meetings of the Board of Directors at which defendant Chesbrough was not present, and had no knowledge of on account of his absence from Bay City from October 17th, 1902 to March 27th, 1903 during which time he was in Chicago, Illinois, on account of his wife's illness.

6th. Said Circuit Court of Appeals erred in not sustaining the 5th, 7th, and 12th assignments of error on the record in said cause. These assignments were based on the admission in evidence of exhibits 25 to 47 inclusive over defendant's objection as to incompetency, because they were never brought to his attention.

Exhibit 25, October 24th, 1902, was a letter from Andrews, the cashier, to Ridgeley, comptroller of the currency.

Exhibit 26 was a letter, October 24th, 1902, to Bump, President, at Washington, from Andrews, cashier, communicating a resolution of the board of directors that investigation would be made of the Maltby account.

Exhibit 27, May 13th, 1903, was a letter from Kane, acting comptroller, to Bump, President, relating to commercial paper contemplated by section 5200 R. S.

Exhibits 29 to 47 inclusive, all dated about October 31st, 1902, were letters from the Old Second National Bank to Michigan Central Railroad Company, Chicago Northwestern Railroad Company, Western Union Telegraph Company, American Tel. & Tel. Company, and various other parties, creditors of the Maltby Lumber Company, as to the state of the accounts between said companies and said Maltby Lumber Company, and various replies thereto.

The cashier said he "thought these letters were presented at the board meeting; he was not sure, but they were considered by the executive officers of the bank". It was not shown that any of these letters were brought to the knowledge or attention of defendant Chesbrough.

7th. Said Circuit Court of Appeals erred in not sustaining the 9th, 31st, 32nd, 112th, 112th*a*, 113th, and 114th assignments of error in the record of said case, which were based upon the exclusion by the District Court of the evidence of Frederick P. Browne, cashier of the First National Bank of Bay City, and the cashiers and directors of the other banks in Bay City, national and State, that it was the usual custom of all directors to attest reports of the condition of the respective banks for publication, relying upon the sworn statements of the officers of the bank, who were honest men, that the statements were correct.

8th. Said Circuit Court of Appeals erred in not sustaining the tenth assignment of error which was based on the admission in evi-

dence by the District Court of the directors' meeting of May 31st, 1902, which declared a dividend out of the earnings of the past six months, over defendant Chesbrough's objection that it was incompetent against him, because he was not present at the meeting, and any evidence as to the payment of dividends was incompetent under the declaration.

9th. Said Circuit Court of Appeals erred in not sustaining the 11th assignment of error based upon the District Court receiving in evidence, minutes of the directors' meeting of June 6th, (at which there was no quorum) November 14th and 28th, 1902, at which meetings discounts were read and approved, but defendant Chesbrough was not present.

10th. Said Circuit Court of Appeals erred in not sustaining the 14th, 15th, 16th, 17th, 18th, 19th, 21st, and 23rd assignments of error, each of which was based upon the ruling of the District Court in admitting in evidence the reports of the bank to the comptroller, as published in the newspaper; the same report being admitted several times, having been published more than once; the report of February 6th, 1903 not having been signed by Chesbrough. Each of the reports in question in the suit having been admitted to be correct according to the books of the bank on the trial of the case.

11th. Said Circuit Court of Appeals erred in not sustaining the 20th assignment of error, which was based upon the District Court permitting plaintiff's counsel to state to the jury during the trial,—

"There were \$220,000.00 of the Maltby indebtedness not charged off at the time the report of June 9th, 1903 was made, and this, with the knowledge of both defendants that such report would be published from the books of the bank".

557 12th. Said Circuit Court of Appeals erred in not sustaining the 22nd to 24th assignments of error which were based upon the District Court permitting the plaintiff to testify over seasonable objection that when he made the purchase on September 16th, 1903 of a certain amount of stock he relied upon the statement published in the Tribune that morning, and had no other knowledge of the then condition of the Old Second National Bank.

13th. Said Circuit Court of Appeals erred in not sustaining the 8th, 10th, 11th, and 73rd assignments of error, each of which was based upon the rulings of the District Court concerning defendant Chesbrough admitting in evidence the record of meetings of the Board of Directors, from which he was absent while in Chicago.

The 8th assignment was based on the admission of the proceedings of the Board of Directors of January 3rd, 1902, at which there was no quorum and at about which time Lewis was placed in Maltby's office by the bank in its interest.

The 10th assignment was based on the admission in evidence of the record of a meeting on May 31st, 1902, at which a dividend was ordered, and at which meeting Chesbrough was not present, being absent in Chicago.

The 11th assignment was based upon receiving in evidence the minutes of the record of the directors' meetings of June 6th, November 14th and 28th, 1902. On June 6th there was no quorum, dis-

counts were read, and on November 14th and 28th discounts were read and approved.

14th. Said Circuit Court of Appeals erred in not sustaining the 3rd, 10th, 88th, and 116th assignments of error, each of which related to the subject of dividends.

The third assignment was based upon the District Court admitting evidence of payment of dividends over defendant's objection that the evidence was not admissible under the declaration.

The tenth assignment was based upon the fact that defendant Chesbrough was not present when the dividend was ordered on May 31st, 1902.

The eighty-eighth assignment was based upon the District Court admitting in evidence the dividends paid by the bank from June 5th, 1897 to November 27th, 1903.

The 116th assignment was based upon the District Court permitting plaintiff to answer the question whether he had received any dividend on his stock during the time he held it. This was objected to as immaterial and incompetent, and not proper re-direct examination. The objection was overruled, and the witness answered, he received one semi-annual dividend of five percent.

558 15th. Said Circuit Court of Appeals erred in not sustaining the assignments of error relating to the subject of charging off paper, which assignments were the 25th, 26th, 28th, 32nd, 33rd, 68th, 97th, 99th, and 120th.

The 25th assignment was based on the ruling of the District Court in which it followed the ruling of said Circuit Court of Appeals in its first opinion on this case, that the real liability of the defendant was based upon the fact that paper in the bank had not been charged to profit and loss, and withdrawn from the live assets of the bank.

Defendant objected to this ruling that it was not competent under the declaration in the case, that neither of the defendants, nor both of them together could have charged off any paper, and neither of them ever opposed the charging off any paper.

No director of the bank during the time covered by the reports ever proposed charging off any of this paper,—the directors regarding the paper as secured and good, but their evidence on this point was excluded by the trial court.

The 26th assignment was based on the District Court receiving testimony in reference to the condition of the bank, or the proceeds of the securities taken by the Board of Directors in 1902-1903 from the Maltby Lumber Company, after the date of November 17th, 1903, the date of the last published report.

The 28th assignment was based upon the District Court admitting plaintiff's testimony that some of the Maltby paper was charged off in January 1905, and at different times after that date when plaintiff was a member of the Board of Directors.

The 32nd assignment was based on the admission, over objection, of the testimony of the witness, Andrews, as to the manner in which the reports for publication were made out, and the admission of the books of the bank showing the profit and loss account after November 1903.

The 33rd assignment was based on the District Court admitting in evidence the profit and loss account of the Bank February 20th, 1905, Maltby Cedar Company successor of Maltby Lumber Company, \$135,000.00. This was objected to as incompetent occurring after the date of November 17th, 1903, the date of the last report.

The court admitted, over the like objection, witness' statement as to the profit and loss account,—“This book shows \$155,000.00.”

The 66th assignment was based on the trial court admitting in evidence the bank's daily statement of December 16, 1903, 559 showing capital stock \$200,000.00—surplus \$75,000.00, undivided profits (net) \$34,911.01.

The 68th assignment was based upon the ruling of the District Court requiring the witness Andrews to answer the—

“Q. You stated that none of the directors made any effort to charge off any paper up to November 17th, 1903, I want to carry that down to December, 1903, was that true?”

This was objected to as immaterial, occurring after November 17th, 1903, which objection was overruled, and the witness answered.

“I don't recall that any effort was made or any discussion in the matter. Not to my knowledge was the effort made by Mr. McGraw or Mr. Chesbrough any more than by anybody else.”

The 97th assignment was based on the court requiring defendant Chesbrough to answer, referring to a date after November 17th, 1903, and referring to the Maltby paper,—“You did find out it was bad to the extent of \$225,000.” Defendant answered,—“I wouldn't say I did.”

“Q. You charged off over \$200,000 paper as bad while you were in the bank?”

“A. I don't remember whether I was a director when that was charged off.”

The 99th assignment was based upon the court requiring defendant Chesbrough, on cross-examination, to answer the,—

“Q. And you carried this same (Maltby) paper at its full face value during the entire year of 1904, on the books of the Old Second National Bank?”

This was objected to as incompetent, not proper cross-examination, and immaterial to the issue in this case, and the witness answered,—“I think we did.”

Defendant's counsel farther objected that what happened in 1904, can not be taken into consideration by the jury in this case. Whereupon counsel for plaintiff stated,—“We are not claiming any probative force for what occurred in 1904”, and plaintiff's other counsel said,—“We do not claim any liability as to what he did in 1904; it simply goes to the credibility of the witness.”

Whereupon the court again overruled the objection and defendant's counsel stated, that “neither one nor two directors could charge off any paper. It was for the Board of Directors to do that.”

560 Which objection was overruled.

The 120th assignment was based on the District Court refusing to charge the jury, as requested by the defendant's counsel at

the close of the case, after a motion to direct a verdict for the defendant had been denied.

The 7th, 10th, and 21st requests to charge submitted by defendant Chesbrough and refused by the court, were as follows:

7th. "I charge you as a matter of law that the comptroller's request for such reports to be made by the bank, and naming a past date upon which the report is to be made, imperatively commands and requires the officers of the bank to report the condition of the bank, as shown by the bank's books, on the date named by the comptroller, and that any change in the report from the condition of the bank as shown by the books, would constitute a false report and would render each officer of the bank knowingly participating therein, liable to the penalties provided in said Act for making a false report."

10th. "I charge you that no absolute duty devolves upon the directors of the bank to charge off any part or portion of the loans and discounts, because the directors, or any of them, believe that a part or portion of such loans and discounts are uncollectible, as such board has an honest discretion as to the amount of paper which it may carry after it has become presently uncollectible, and that in order for you to find that the board of directors neglected its duty to the plaintiff in failing to charge off any part or portion of the loans and discounts held by this bank, known as the Maltby Lumber Company paper, you must further find from the evidence in this cause that the Board of Directors, as a board knowingly acted dishonestly, and in bad faith, in carrying the whole of this Maltby paper, as live paper, among the loans and discounts of the bank at its par value."

21st. "I charge you that as appears from the evidence, the defendant, Chesbrough signed but two reports; one of April 9th, 1903, and the other of November 17th, 1903, and that no other of the reports complained of was made by him as a director; and I charge you that under the evidence in this case, you would have no right to find a verdict against the defendant, Chesbrough for and on account of the making of the reports by any other of the directors, or for and on account of any knowledge possessed by any other of the directors, except the said Chesbrough himself at the time of the making of these two reports."

561 16th. Said Circuit Court of Appeals erred in not sustaining the 131st assignment of error which was based upon the District Court charging the jury, as follows:

"Plaintiff was not compelled to sue all the directors who signed the reports, or who served during the years complained of, he had a right to select the two defendants and sue them alone if he desired."

17th. Said Circuit Court of Appeals erred in not sustaining the 69th, 78th, 79th, 81st to 87th inclusive, 104th, 105th, 106th, 107th, and 130th assignments of error, each of which was based upon the exclusion by the District Court of any evidence on the part of the directors other than the two defendants, that they each believed the Maltby line of discounts and advances made on bills of lading were good, secured, and should not have been charged off prior to November 18th, 1903. (Of the seven directors during the time in question,

at the time of the trial, Bump and Cooke were dead, James Davidson was totally deaf, and James E. Davidson, Edgar B. Foss, Joseph W. McGraw and Frank P. Chesbrough were sworn for defendants.)

The 69th assignment was based on the court's exclusion of evidence that the Maltby Lumber Company loan was secured, and the directors considered the security good and worth every dollar of it.

The 78th assignment was based on the District Court's refusal to receive evidence that the bank lost no money, because the Maltby drafts on railway companies, etc., were not forwarded for acceptance.

The 79th assignment was based on the trial court's refusal to permit director James E. Davidson to state what he did about signing the report of Sept. 9th, 1903.

The 81st, 82nd, and 83rd were all based on the exclusion by the District Court of evidence offered by defendants of talk with Bump, the president of the bank, about the Maltby line, by the directors and his assurance to them with reference to the line, and the fact that James E. Davidson, after the receipt of securities in 1902 and 1903, regarded the Maltby line as secured.

The 84th assignment was based on the District Court's refusal to permit the defendant Chesbrough to answer whether he believed the loans and discounts on hand April 9th, 1903, were good for the amount listed in the statement.

The 85th assignment was based on the trial court's refusal to allow defendant to show that the other directors relied on Bump, the president of the bank, with reference to this paper.

562 The 86th and 87th assignments were based on the District Court's refusal to permit the defendant Chesbrough to testify that in April 1903 he regarded the paper in question as secured, and that when he attested the two reports, which included the Maltby paper, he regarded that paper as good at that time.

The 104th assignment was based on the District Court's refusal to allow director Foss to answer why he attested the reports to the comptroller published in 1903.

The 105th assignment was based on the court excluding the testimony of director Foss that when he signed said reports, he believed the reports to be true, and a correct transcript of the books of the bank.

The 106th assignment was based on the refusal of the District Court to permit director Foss to say what information he had from President Bump about this Maltby paper on or about May 1st, 1902, and also refused to allow him to state how he regarded the Maltby line of discounts at the time he signed the reports.

The 107th assignment was based on the refusal of the District Court to permit director Foss to state whether during 1903 he regarded the Maltby line as secure; that he relied upon the information given him by Bump, and that his judgment, and that of the board in January 1903 was that the Maltby line was secure.

The 130th assignment of error was based upon the District Court charging the jury, as follows:

"You are not concerned in this case with what Andrews knew or

believed, or what any of the directors knew or believed, except the defendants themselves."

18th. Said Circuit Court of Appeals erred in not sustaining the 43rd and 93rd assignments of error, each of which was based upon the District Court admitting testimony of the witness James M. Lewis, who, about January 1903, was put in Maltby's office by the bank, to state that his connection with the bank was supposed to be secret, and in requiring the defendant Chesbrough to answer whether "Lewis was there representing the bank, but ostensibly as an employe of the Maltby Lumber Company." To which defendant Chesbrough replied,—"I knew that Lewis was in the office."

19th. Said Circuit Court of Appeals erred in not sustaining the 45th, 46th, 47th, 49th, and 112th assignments of error, each of which related to the admission of testimony from the witness Lewis, who had no knowledge of the Maltby Cedar pole, tie, etc., business, or how it should be conducted, to testify that in his judgment he realized from and handled the bank's securities as well as it could be done.

20th. The Circuit Court of Appeals erred in refusing to sustain the 64th, 118th and 119th assignments of error; the 64th
563 being based upon the refusal of the District Court to direct a verdict in favor of the defendant Chesbrough at the end of plaintiff's case; because, plaintiff could not maintain an action against two of seven directors, because nothing was charged or proved against defendant, except the signing and attesting the publications of the reports set forth, which were correct according to the books of the bank; had been sworn to by the cashier of the bank who was honest and faithful;—because the report of September 9th was not attested by defendant Chesbrough;—because two directors could not declare a dividend nor prevent one being declared;—because the directors were not responsible for bad debts made by the president or cashier of the bank, or which turned out years later to be bad;—because defendant Chesbrough nor both defendants together could not charge off any of the paper of the bank,—nor was it alleged or proved that either of the defendants prevented any paper being charged off, or that any one of the directors of the bank, during the time in question, believed that any of the paper should be charged off; because the employes of the bank were honest and faithful, and the directors had a right to rely upon the accuracy and correctness of the books of the bank, and were not charged with knowledge of what appeared thereon or in the correspondence of the bank:

For the reason that it is shown that the defendant Chesbrough was not present at the meeting- of the directors, which were held on April 4, 11, 18, and 25th, 1902, nor at the meetings of May 2, May 16, and May 31st, 1902. Neither was he present at the meeting held June 27th, nor July 11, nor 18, nor 25, nor August 1, 8, 15, or 29; that he was not at the meeting held September 12 nor 19 nor 26; that he was not there on the 10th day of October, 1902; nor at the meetings held on the 24th or 31st of October, 1902; nor was he present at the meetings held November 7, 28, December 4, 12, 19,

nor 26th. Neither was he present at the meetings held January 2, 9, 16, 23, nor 30th of January, 1903. Nor at the meetings held on February 6, 13, 20, 27th, 1903; nor at the meetings of March 6, 13, nor 20th, 1903; nor at the meetings of April 17, 1903, nor May 1, 1903, nor May 29, nor June 12, 26, nor July 3 nor July 10, 17, 24, 31, August 8, 14, 21, 28, nor at the meeting- of October 2, 9, 16, and 23, 1903.

The 118th assignment was based on the refusal of the court to direct a verdict for defendant Chesbrough at the conclusion of the case, the right to make that motion at that time having been reserved, and no claim or allegation being made in the declaration charging defendant Chesbrough, or the board of directors, with failing to write off any portion of the loans and discounts of the bank, and for the reasons above stated.

The 119th assignment was based on the refusal of the District Court to grant defendant's motion to strike out of the case, anything in the case relating to anything after November 17th, 1903, (with the exception of the two reports signed by Woodworth of January 11th and May 29th, 1905) for the reason that the second opinion of the Court of Appeals, paragraph 2, holds, that the defendants' liability can not be estimated as of any date later than November 17th, 1903, their latest act, which was constructively a representation of fact by them to the plaintiff on that date, and therefore, 564 fore, the stock purchase of December 16th, 1903, and all testimony in the case relating to a date after November 17th, 1903, should be stricken out.

21st. Said Circuit Court of Appeals erred in overruling the 121st to 131st assignments of error, inclusive; each of which assignments related to specific portions of the charge of the court to the jury.

The 121st assignment was based on the following portion of said charge:

"It is claimed that all of these violations of the statute were part of a general design on the part of the defendants to deceive the public. This part of plaintiff's claim stated in the tenth count therefore treats all of the defendants' acts as part of one general design to deceive the public, and treats all of plaintiff's purchases and damages as resulting from this design, and recoverable as a whole."

The 122nd assignment was based on the following portion of said charge:

"In addition to the tenth count of the plaintiff's declaration, which is referred to there are the first, second, fourth, and fifth counts, which rely respectively on the reports of February 6, April 9, September 9, and November 17th, 1903, and treat each purchase of stock by plaintiff as a separate cause of action resulting from the publication of the preceding report. These counts, therefore, enable you to consider each report and each purchase by itself, if you think they should be so considered. Plaintiff does not claim, and is not required to prove that the defendants actually signed their names on the copies of the report which were sent to the printer, or that defendant Chesbrough signed all of the reports, or that his name was printed on all of them."

The 123rd assignment was based on the following portion of said charge,—

"The underlying fault, if any such was committed in this case, was in the failure of the board of directors of the bank to write off such part or portion of the loans and discounts as they then knew to be bad, if any."

The 124th assignment was based on the following portion of said charge,—

"If the defendants knew this, and it is my memory of the testimony that they both admitted that they did, it is not important whether both of them or either of them attested each report."

565 The 125th assignment was based on the following portion of said charge,—

"For these reasons the act upon which liability depends is not the signing of the report itself, but the failure to make reasonable personal efforts to induce the board to charge off assets which have become worthless, if assets have actually at that time become worthless, and are at that time known to said director to be worthless."

The 126th assignment was based on the following portion of said charge,—

"It is not necessary for the plaintiff to prove any actual conscious design or intention on the part of the defendants to mislead or deceive the plaintiff."

The 127th assignment was based on the following portion of said charge,—referring to the reports of January 11th and May 29th, 1905.

"The mere fact that plaintiff signed the 1905 reports or either of them does not prevent his recovery, and does not excuse the defendants if they are otherwise liable."

The reports referred to were the reports to the comptroller made January 11th and May 29th, 1905 when loans and discounts included over \$140,000.00 of the Maltby paper.

The 128th assignment was based on the following portion of said charge,—

"If plaintiff relied upon the published reports, it makes no difference whether he did or did not make additional investigation. His negligence, if any, is not a defense in an action of this kind."

The 129th assignment of error was based on the following portion of said charge,—

"It is not necessary for plaintiff to show that defendants actually derived any benefit from the claimed violation of the statute. Plaintiff's right to recover, if any, depends upon his loss, and not upon their gain."

566 The 130th assignment of error was based upon the following portion of said charge,—

"You are not concerned in this case with what Mr. Andrews knew or believed or what any of the directors knew or believed, except the defendants themselves."

The 131st assignment of error was based on the following portion of said charge,—

"Plaintiff was not compelled to sue all of the directors who

signed the reports or who served during the years complained of, but he had a right to select the two defendants, and to sue them alone if he desired."

22nd. Said Circuit Court of Appeals erred in not sustaining the 63rd and 115th assignments of error, each of which was based on the refusal of the trial court to permit the plaintiff to be cross-examined under the Michigan Statute, permitting cross-examination of a plaintiff, as a witness, without making him the witness of the defendant, which ruling defendant Chesbrough contends was contrary to the Michigan Statute, Public Acts 1909, No. 307, page 753, Howell's Michigan Statutes, 12865:

"Hereafter in any suit or proceeding in any court or equity in this state, either party, if he shall call as a witness in his behalf the opposite party, employe or agent of said opposite party, or any person who, at the time of the happening of the transaction out of which such suit or proceeding grew, was an employe or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling or examining such witness shall not be bound to accept such answers as true."

And, also, contrary to the Rev. Statutes of the United States, Sec. 858 as amended in 1906, and reenacted in the Judiciary Act of 1911, U. S. Com. Stat. 1911, p. 271.

23rd. Said Circuit Court of Appeals erred in not sustaining the 53rd and 54th assignments of error, each of which was
567 based on rulings of the District Court excluding testimony for defendant that the directors of the First National Bank, of Bay City, were attempting prior to November 17th, 1903, to acquire the stock of the Old Second National Bank for the purpose of consolidating the banks, and that plaintiff Woodworth was acting with them in the purchase of the stock.

24th. Said Circuit Court of Appeals erred in not sustaining the 77th assignment of error which was based on the action of the District Court in receiving evidence of what was done in the disposition of the securities by the bank, their sale and management, and the loss to the bank which accrued during the five or six years after November 17th, 1903, as a "history of the transaction."

25th. Said Circuit Court of Appeals erred in not sustaining the 103rd assignment of error, which was based on the refusal of the District Court to permit defendant's witness, director Edgar B. Foss, to testify that the employes, bookkeepers, and tellers of the bank in 1902 and 1903 were honest and competent.

26th. Said Circuit Court of Appeals erred in not sustaining the 34th, 35th, and 62nd assignments of error.

The 34th and 35th assignments were based on the admission in evidence of the by-laws of the Old Second National Bank, and the 62nd assignment being based on the admission in evidence by the District Court of the daily statements of the bank of the dates when dividends were voted, and also, the dates when dividends were pay-

able, namely,—May 29th, June 1st, November 27th, and December 1st, 1903, which were seasonably objected to as incompetent; defendant Chesbrough not being bound by the books of the bank, nor action in reference to dividends in which he took no part, and the dividends having been paid in good faith on advice of counsel.

27th. Said Circuit Court of Appeals erred in not sustaining the 58th assignment of error, which was based upon the action of the District Court in admitting in evidence the sales of stock that the Second National Bank made by Jennie McGraw Curtis, sister of defendant Joseph W. McGraw, Joseph W. McGraw, Aaron Chesbrough, and the defendant, Frank P. Chesbrough.

28th. Said Circuit Court of Appeals erred in not sustaining the 36th, 37th, 40th, 51st, 74th and 77th assignments of error, each of which were based on the rulings of the District Court with reference to the witness Alvin Maltby.

The 36th assignment was based on a ruling admitting evidence of a loss of the bank made on Mosher paper (through Maltby) several years before 1903.

The 37th assignment was based on the District Court admitting evidence as to whether the Maltby Lumber Company had 568 any commercial rating in 1902 and 1903.

The 40th assignment was based on the court receiving in evidence exhibits 29 to 39 inclusive, which were letters passing to and from the cashier of the bank to third parties as to the state of their accounts with Maltby Lumber Company, none of which were shown to have been brought to the attention of defendant Chesbrough.

The 51st assignment was based on a ruling of the District Court admitting hearsay evidence from James M. Lewis as to tax titles against the Maltby lands, and his manner of dealings with the lands, they being part of the security held by the bank.

The 74th assignment was based on the ruling of the District Court in permitting an inquiry as to whether Alvin Maltby had gone through bankruptcy prior to the formation of the Maltby Lumber Company.

The 77th assignment. Cashier Andrews for the defendants was testifying in regard to the bundle of letters which he produced, and which came from the files of the Old Second National Bank, and were received without objection, whereupon plaintiff's counsel said—

"We take the position of making no objection as to the history of the transaction, but we object to them as substantive evidence of the good faith of the defendant. Defendant's counsel took exception to this statement, but the Court said nothing."

All the letters were acceptances by Maltby customers of the assignment of the bills of lading and accounts to the bank for the products sold by Maltby.

You will, also, take notice that the printed record which said plaintiff in error thinks necessary for the consideration of said errors so assigned, is the printed record used in the Court of Appeals,

with the amendments agreed to heretofore between counsel in this case, with the following exceptions; namely:

Page 95. Omit plaintiff's exhibit 66.

Pages 100-1-2-3-4-5 and 6. Omit plaintiff's Exhibits 68 569 to 72 inclusive, and 74 to 83 inclusive.

Pages 110 and 111. Omit plaintiff's exhibits 84 to 93 inclusive.

Pages 167 et seq. Omit plaintiff's exhibits 154 to 160 inclusive.

Pages 170-171. Omit plaintiff's exhibits 161, 162.

Pages 172-175. Omit plaintiff's exhibits 163 to 168 inclusive.

Page 425. Omit the first, second, third, fourth, fifth, sixth, eighth, ninth and tenth to twentieth inclusive of defendant's requests to charge.

Add to the record as printed for the Court of Appeals, their opinion in the case filed April 6th, 1915; certified copy of remittitur filed by defendant in error; the judgment rendered thereon by the Court of Appeals; plaintiff in error's assignment of errors, and proper notification as to issue of writ of error, citation, and bond as required by rules of the Supreme Court.

THOMAS A. E. WEADOCK,

Attorney for Plaintiff in Error.

570 Supreme Court of the United States, October Term, 1915.

Docket No., 536.

FRANK P. CHESBROUGH, Plaintiff in Error,

vs.

FRANK T. WOODWORTH, Defendant in Error.

UNITED STATES OF AMERICA,

Eastern District of Michigan, ss:

Thomas A. E. Weadock being duly sworn, deposes and says, that on the 16th day of September, A. D. 1915, he served a true copy of the foregoing designation for printed record in this cause upon Edward S. Clark, Esq., attorney for the defendant in error, by delivering the same to him personally at his office in Bay City, Michigan.

Further, deponent says not.

THOMAS A. E. WEADOCK.

Subscribed and sworn to before me this 20th day of September, A. D. 1915.

[Seal of Martha E. Spencer, Notary Public, Wayne Co., Mich.]

MARTHA E. SPENCER,

Notary Public, Wayne Co., Michigan.

My Commission Expires April 9, 1918.

- 571 [Endorsed:] 536/24819. Court No. 536. Office No. —.
In the Supreme Court of the United States. Frank P. Chesbrough, Plaintiff in error, vs. Frank T. Woodworth, Defendant in error. Designation for printing by plaintiff in error, and proof of service. Thomas A. E. Weadock, Attorney for pl'ff in error, Hammond Building, Detroit, Michigan.
- 572 [Endorsed:] File No. 24,819. Supreme Court U. S., October term, 1915. Term No. 536. Frank P. Chesbrough, pl'ff in error, vs. Frank T. Woodworth. Statement of errors and designation by plaintiff in error of parts of record to be printed. Filed September 22, 1915.

573 In the Supreme Court of the United States, October Term, 1915.

No. 536.

FRANK P. CHESBROUGH, Plaintiff in Error,
vs.
FRANK T. WOODWORTH, Defendant in Error.

No. 537.

FRANK T. WOODWORTH, Plaintiff in Error,
vs.
FRANK P. CHESBROUGH, Defendant in Error.

Cross-writ of Error.

Designation by Frank T. Woodworth, Defendant in Error and Plaintiff in Error in Cross-writ of Error, of Portions of Record Which Should be Printed.

To Thomas A. E. Weadock, Attorney for Frank P. Chesbrough, Plaintiff in Error:

Please take notice that the following are the parts of the record considered material by the defendant in error in case number 536, in addition to the parts designated by you, viz:

Plaintiff's exhibits 66; 68-72 inclusive; 74-83 inclusive; 84-93 inclusive; and 154-168 inclusive. Also all of the defendant's requests to charge.

We do not consent to the omission of any of the above exhibits as proposed by your designation on file.

574 In case number 537, the said Frank T. Woodworth as plaintiff in error, submits the following as a statement of the errors upon which he intends to rely, the same being a copy of the assignment of errors filed in the United States Circuit Court of Appeals, for the Sixth Circuit, and duly certified to this Court, viz:—

First. Said Circuit Court of Appeals erred in not entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Michigan, Northern Division, for the full sum of Twenty-three Thousand, Seven Hundred Fourteen

(\$23,714.00) dollars and costs of suit, that being the amount for which judgment was entered in the District Court aforesaid.

Second. Said Circuit Court of Appeals erred in requiring the defendant in error to remit the sum of seven thousand, seven hundred and eight dollars and fifty-six cents (\$7,708.56), or to submit to a new trial of said cause.

Third. Said Circuit Court of Appeals erred in holding that the verdict rendered by the jury in the District Court of the United States for the Eastern District of Michigan, Northern Division, was excessive.

Fourth. The said Circuit Court of Appeals erred in holding that the McGraw report so-called, being exhibit 223, offered by plaintiff in error in the District Court aforesaid, was legally insufficient to support the verdict rendered by the jury in said court.

Fifth. The said Circuit Court of Appeals erred in holding that the act of the defendant in error in signing a certain report of the condition of the Old Second National Bank should be given any effect in considering the degree or nature of the proof required to justify the submission to the jury of the entire claim made by the defendant in error. The report aforesaid was offered in evidence in the District Court by plaintiff in error as Exhibit 169.

Sixth. The said Circuit Court of Appeals erred in holding that in order to support the verdict of the jury rendered in the District Court aforesaid, the said defendant in error should be required to show affirmatively that the plaintiff in error at the time of the grievances complained of in the declaration, had actual knowledge that the loss suffered by the Old Second National Bank by reason of the discounts then and theretofore made for the Maltby Lumber Company would amount to the full sum of Two Hundred Thousand Dollars used as a basis of the verdict rendered by the jury.

Seventh. The said Circuit Court of Appeals erred in awarding and rendering judgment against the defendant in error and in favor of the plaintiff in error, for the costs of suit in the said Circuit Court of Appeals.

575 You will also take notice that the printed record which the said Frank T. Woodworth as plaintiff in error in case number 537 thinks necessary for the consideration of the errors so assigned is the same record as in case number 536, viz: The printed record used in the Court of Appeals with the amendments heretofore agreed upon between counsel in this case, to which shall be added the opinion of the Circuit Court of Appeals filed April 6, 1915, and also their former opinions filed therein on March 5, 1912 and April 5, 1912, to which should be added the assignment of errors filed by said Woodworth as plaintiff in error in case number 537, and proper notation as to the issuance of the writ of error thereon, with citation and bond, as required by the rules of the Supreme Court.

Yours, etc.,

EDWARD S. CLARK,

Attorney for Frank T. Woodworth, as Defendant in Error in Case #536 and as Plaintiff in Error in Case #537.

STATE AND EASTERN DISTRICT OF MICHIGAN,
County of Bay, ss:

Laura Braun, of Bay City, Michigan, being duly sworn, deposes and says that on the 20th day of September, 1915, she served a copy of the above designation on T. A. E. Weadock, attorney for Frank P. Chesbrough, the defendant in error herein by enclosing the same in a sealed envelope plainly addressed to said Weadock at Hammond Building, Detroit, Michigan, that being his business address, and depositing the same in the United States post office at Bay City, Michigan, duly postpaid.

LAURA BRAUN.

Subscribed and sworn to before me this 20th day of September, 1915.

[Seal of Jessie Thompson, Notary Public, Bay County, Mich.]

JESSIE THOMPSON,
Notary Public, Bay County, Mich.

My Commission expires April 16, 1919.

576 [Endorsed:] 536/24819. 537/24820. In the Supreme Court of the United States, October Term, 1915. No. 536. Frank P. Chesbrough, Pl'ff in Error, vs. Frank T. Woodworth, Def't in Error. No. 537. Cross Writ of Error. Frank T. Woodworth, Pl'ff in Error, vs. Frank P. Chesbrough, Def't in Error. Designation etc. with proof of service. Gilbert & Clark, 230-231 Shearer Bldg., Bay City, Mich.

577 [Endorsed:] File Nos. 24,819 & 24,820. Supreme Court U. S., October term, 1915. Term Nos. 536 & 537. Frank P. Chesbrough, Pl'ff in Error, vs. Frank T. Woodworth. Frank T. Woodworth, Pl'ff in Error, vs. Frank P. Chesbrough. Statement of errors and designation by Woodworth of parts of record to be printed. Filed September 22, 1915.

Endorsed on cover: File No. 24,819. U. S. Circuit Court Appeals, 6th Circuit. Term No. 536. Frank P. Chesbrough, plaintiff in error, vs. Frank T. Woodworth. File No. 24,820. Term No. 537. Frank T. Woodworth, plaintiff in error, vs. Frank P. Chesbrough. Filed July 2d, 1915. File Nos. 24,819 and 24,820.

JAN 2 1917

JAMES B. MAHER

CLERK

Supreme Court of the United States

FRANK P. CHESBROUGH,
Plaintiff in Error,

vs.

FRANK T. WOODWORTH.

October Term, 1916.

No. 179.

FRANK T. WOODWORTH,
Plaintiff in Error,

vs.

FRANK P. CHESBROUGH.

No. 180.

In Error to the United States Court of Appeals for the Sixth Circuit,
Nos. 24,819, 24,820.

BRIEF FOR FRANK P. CHESBROUGH

Plaintiff in Error and Cross Defendant.

THOMAS A. E. WEADOCK, Detroit,
Attorney for Frank P. Chesbrough.

DETROIT:
CONWAY BRIEF CO., 142-150 LAFAYETTE BOULEVARD
1916

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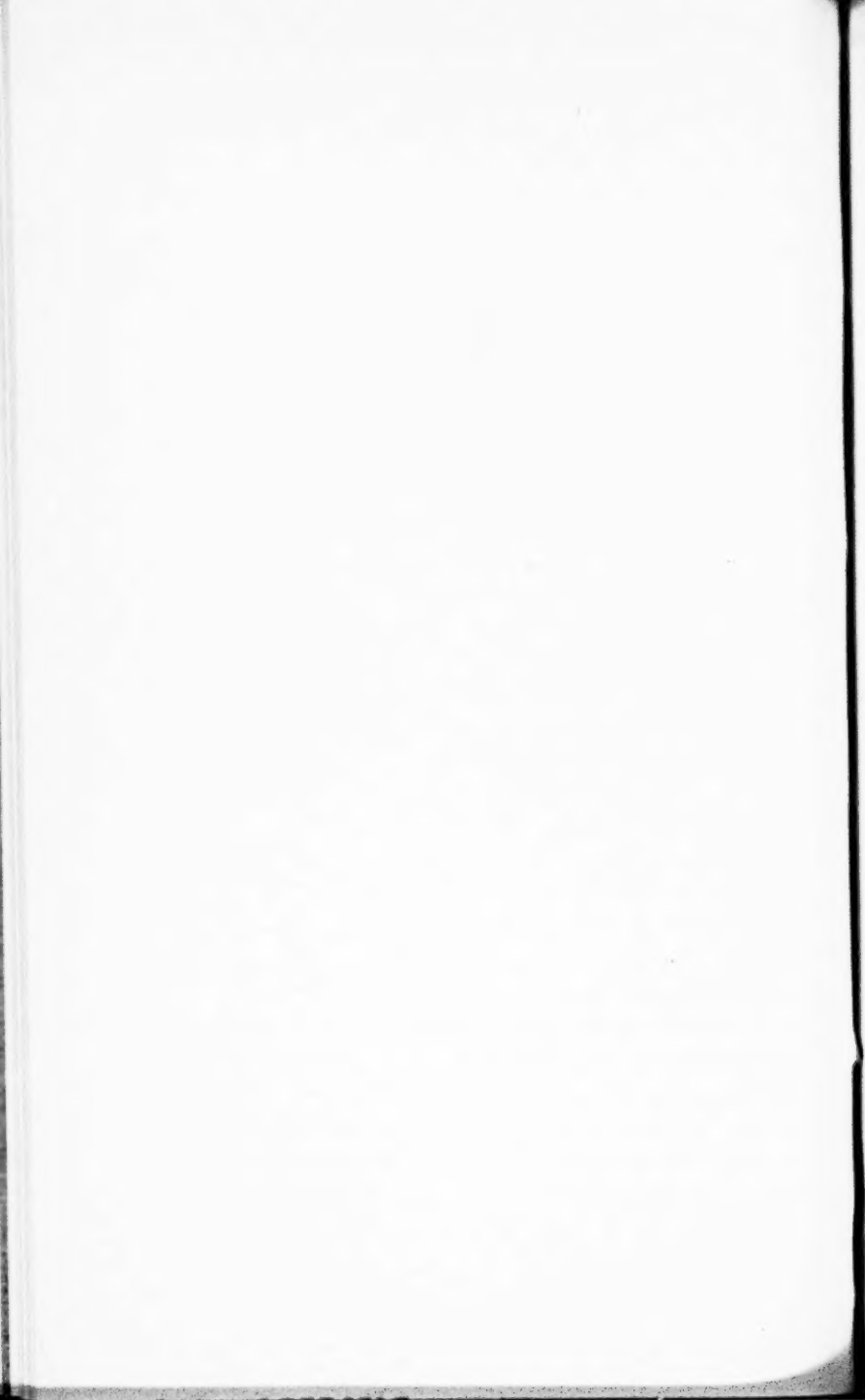
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SUPREME COURT OF THE UNITED STATES.

FRANK P. CHESBROUGH,
Plaintiff in Error,

vs.

FRANK T. WOODWORTH.

October Term 1916.

No. 179.

In Error to U. S. Court of Appeals, Sixth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

HISTORY OF THE CASE.

This litigation was begun in the Michigan Circuit Court, *Smalley vs. McGraw*, 148 Mich. 384, 395. After the decision of this court in *Yates vs. Jones National Bank*, 206 U. S. 158, on a motion of defendant for rehearing, the Supreme Court of Michigan said of that case "It does establish a different test for the liability of directors, etc. * * and such test must be considered the law of the case in all further proceedings."

The cases were then discontinued, and this suit was begun in the U. S. Circuit Court at Bay City, Michigan, March 31, 1908, against Joseph W. McGraw and Frank P. Chesbrough, two of the seven directors of the Old Second National Bank at Bay City.

Both defendants demurred to the declaration, which demurrer was overruled (Rec. p. 22).

Both defendants then pleaded the general issue with notice of various defenses, Chesbrough's plea (Rec. pp. 23-26), averring that plaintiff's cause of action, if he ever had any, was barred by the five year limitation, etc., etc.

The affirmative action of defendant which was the only thing complained of in the declaration was alleged to have occurred from February 6th to November 17th, 1903, and consisted of attesting reports to the comptroller all for publication, which were false, and for wrongful payment of two dividends.

Only two reports during that time were attested by Chesbrough, those of April 9th and November 17th, 1903.

The case was tried before Hon. Henry H. Swan and a jury, and on June 12, 1909 a verdict was rendered for plaintiff against both defendants in the sum of \$25,872.33. A motion for new trial was denied, and in the Court of Appeals, Sixth Circuit, the judgment was reversed, and a new trial granted on March 5, 1912. A motion of plaintiff Woodworth to modify the judgment was denied April 5, 1912. 195 Fed. Rep. 875, 116 C. C. A. 465.

The case was tried again before Hon. Arthur J. Tuttle, District Judge, at Bay City, Michigan, December 3rd, to 19th, inclusive, 1912. Judgment for plaintiff was entered, November 22nd, 1913, for \$23,714.00. An order of severance between the defendants was entered November 22nd, 1913 (Rec. p. 391) and defendant Chesbrough reviewed the case in the United States Circuit Court of Appeals, which court on April 6th, 1915, affirmed the judgment if plaintiff within 30 days would remit \$7,708.56, otherwise the judgment would be reversed and a new trial granted, and in either case Chesbrough would recover costs of the Court of Appeals (Rec. p. 419).

221 Fed. 912.

Plaintiff remitted as required, and sought by some interpolated verbiage in the remittitur filed to accept what was in his favor and avoid what was against him viz: A new trial, but the Court said by its judgment, that

“But such approval is not to be taken to imply that such right of review can thereafter exist, or that such attempted reservation has any effect to make the remittitur other than absolute and unconditional” (Rec. p. 422).

Thereafter plaintiff Woodworth sued out a cross writ of error which plaintiff in error on Oct. 12, 1915 moved to quash and dismiss in this court. Consideration of which motion was postponed to the hearing.

The questions in the case are presented by the demurrer of defendant Chesbrough to the declaration, which was overruled, the admission and exclusion of testimony. The refusal to direct a verdict for defendant Chesbrough at the close of plaintiff's case, and also at the close of the whole case, the motion being then renewed pursuant to leave, also the ruling of the court about charging off the Maltby paper as bad prior to September 17, 1903.

The rulings as to defendant Chesbrough's liability, while he was absent in Chicago and did not attend meetings of the directors.

The rulings on the subject of dividends.

Other matters set forth in the assignment of errors.

The Second National Bank, of Bay City, Michigan, has been in business constantly from the time of its organization, 1876, and its re-organization as the Old Second National Bank in 1894. This fact distinguishes this case from any other because in every other case the bank had failed.

Probably four examinations of the bank were made by Federal examiners during the time in question; two were made in 1903.

After 1876 the State Bank organized under the laws of Michigan, was consolidated with it, Alonzo Chesbrough, father of the defendant, Frank P. Chesbrough, and his brothers, Fremont B. ^WAdam and Aaron Chesbrough, was president of the State Bank, and its cashier was Orrin Bump, who on the consolidation became cashier of the Second National Bank, and remained such until he was elected its president, and he was re-elected on the reorganization in 1894, at the expiration of the charter. He continued to act as cashier all the time. As to the Old Second National Bank, the name taken on re-incorporation, he was its president and active manager during all the time in which the transactions complained of took place, and made all of the Maltby loans. He came to Bay City from Flint, Michigan, as did Alvin Maltby and M. M. Andrews, the Cashier. Bump and Maltby were especially well acquainted. (Andrews Rec. p. 106).

JOHN MCGRAW, uncle of defendant J. W. McGraw, was one of the founders of the bank.

Defendant, Chesbrough, inherited his stock from his father. Both defendants kept their accounts in this bank all the time, Chesbrough kept ^{his} his personal account as well as the account of his firm, which would average \$15,000, and was often \$35,000.

In 1895 Orrin Bump was president, James Davidson Vice-President, M. M. Andrews, Cashier, and the directors were Selwyn Eddy, L. E. Noyes, James Davidson, Darwin C. Smalley, (plaintiff's uncle), (Rec. p. 35), Joseph W. McGraw, Orrin Bump, Frank P. Chesbrough, Edgar B. Foss and Aaron J. Cooke.

1896-7-8-9, 1900 and 1901, the officers and directors remained the same, except Smalley, plaintiff's uncle, who died about 1899.

In 1901-2 Orrin Bump was president, James Davidson, Vice-President, and M. M. Andrews, Cashier. In 1902 James E. Davidson, son of James Davidson, succeeded L. E. Noyes, who had died.

In 1903 James Davidson was President, Frank P. Chesbrough, Vice-President, M. M. Andrews, Cashier; and the directors were James Davidson, James E. Davidson, Joseph W. McGraw, Edgar B. Foss, Aaron M. Chesbrough, and M. M. Andrews, the latter two succeeding Selwyn Eddy and A. J. Cooke.

In 1904 all directors and officers were the same.

In 1905 James E. Davidson was President, Frank T. Woodworth (plaintiff) was Vice-President, and the directors were James E. Davidson, Edgar B. Foss, Frank T. Woodworth, John L. Stoddard, George B. Jennison and Martin M. Andrews.

In 1906 the officers were James E. Davidson, President; Edgar B. Foss, Vice-President, M. M. Andrews, Cashier; and the directors were James E. Davidson, Edgar B. Foss, M. M. Andrews, John L. Stoddard and George B. Jennison.

Prior to 1897 the capital stock of the bank was \$400,000.00.

On January 20th, 1897 it was reduced from \$400,000.00 to \$300,000.00; \$100,000.00 being paid back to the stockholders.

In 1899, owing to losses, after the Mosher failure, the stock was reduced from \$300,000.00 to \$200,000.00 and remained at that sum during the time in question.

In 1906, after plaintiff had been a director for a year, and a large amount of the Maltby and Brotherton paper had been charged off, the capital was reduced to \$100,000.00.

ORRIN BUMP was considered, during the time in question, one of the best bankers in Bay City. The Board of Directors in accepting his resignation "on account of continued ill health" * * * "expressed their appreciation of his labors as cashier and president of the bank, the welfare of which had been his ambition for so many years." This was signed by the full board (Rec. p. 101). Witnesses on the trial testified:

Plaintiff Woodworth testified—

"In 1902 I had no reason to consider Orrin Bump anything else than a thoroughly honest and capable man and a good banker. That was the general judgment in Bay City, especially among the business men" (Rec. p. 36).

Edgar B. Foss, Rec. p. 350,—

"I knew Mr. Orrin Bump for about twenty years. He was considered a first-class banker, and ranked among the best in Bay City. No question as to his ability or as to his integrity."

Chester L. Collins, Attorney for the bank and later Circuit Judge, Rec. p. 244,—

"Q. What sort of a man as to honesty and integrity was Orrin Bump?

A. He was absolutely and thoroughly honest. I think he was one of the very best."

James E. Davidson, Rec. p. 234,—

"Orrin Bump was considered a good banker. His character was considered good."

M. M. Andrews:—

“The honest, ability, and integrity of Orrin Bump was never questioned. He was competent, honest, and capable.”

These facts are undisputed.

On Nov. 7, 1902, Bump was granted a leave of absence for six months on account of ill health. He never returned to the bank and resigned on account of ill health (Rec. p. 67) June 31st, 1903, which resignation was accepted Sept. 4, 1903, and he died in California Oct. 4, 1907, of Bright's disease, which he had long before he left the bank.

The knowledge learned by these examiners is privileged, and could not be shown. Under the trial court's ruling in this case, if other members of the board thought the paper now questioned good, that did not help defendants.

The court's position was that it was what these two defendants believed that determined the matter.

It is undisputed that the published reports complained of were correct according to the books of the bank. They were in evidence.

It is undisputed that the books of the bank were correctly kept.

It is undisputed that no representations, oral or written, were made by either of the defendants to the plaintiff, as to the value of the bank stock, or anything relating to the whole matter.

It is undisputed that plaintiff was not asked by any stockholder in the bank to buy its stock, and that he bought for himself and his family because he wanted the stock as he testified.

It is proved by uncontradicted testimony that the president, cashier, attorney and all the directors of the bank regarded the Maltby Lumber Co. paper as good when taken by Bump in 1902 and as secured during the year 1903.

That the loss to the bank on the Maltby Lumber Co. paper was not ascertained until long after the time mentioned in the reports complained of.

The trial occurred nine years after the transactions in question.

That the bank has always been and still is solvent and has been during all the time, and is now doing business.

Defendant Chesbrough had sold all his stock except one thousand dollars May 6th, 1902, which amount he continued to hold, at the request of Pres. Bump showing that he had no motive whatever in aiding the sale of his stock by means of the reports which all bore date after that time, the first report complained being nearly a year later.

Mr. Andrews succeeded Mr. Bump as cashier, and was in the bank all the time in question, and a great many years more. He identified the books and papers, and showed the amount owing by The Maltby Lumber Company from time to time, but these entries and accounts in the books of the bank should not affect the defendant Chesbrough, for he is not bound by them, nor were they ever brought to his attention.

None of the paper now complained of was charged off prior to Nov. 17, 1903, the date of the last report. No proof was offered at the trial that it should have been charged off before that time but plaintiff's contention was that the books and papers in the bank showed some of it was not good, and nearly all the proof which was offered related to what happened in 1903-4-5 and down to the time of the trial over nine years afterward.

Both defendants testified that they believed the paper good, and after the question of security arose, that it was secured (Rec. p. 266 top.)

Defendant Chesbrough was asked on cross examination (Rec. p. 283)—

“Q. And you carried this same paper at its full face value during the entire year of 1904, on the books of the Old Second National Bank?”

This was objected to as not proper cross-examination, incompetent under the declaration, and incompetent and immaterial to the issue in this case.

Overruled; exception for the defendants.

A. I think we did.

Mr. Humphrey: Does your Honor hold in this case, that what happened in 1904 can be taken into consideration by this jury, on this question?

Mr. John Weadock: We are not claiming any probative force for what occurred in 1904, except as a part of the cross-examination of this witness. I submit it is entirely proper cross-examination.

Mr. Humphrey: We are not trying what took place in 1904, and it is not proper cross-examination, and the jury have no right to consider it, and it has no right to be in evidence before the jury.

Mr. Clark: We do not claim any liability as to what he did in 1904. It simply goes to the credibility of the witness.

The Court: The objection is overruled.

Mr. Humphrey: Note an exception.

The Court: It is admitted as bearing on the credibility of the witness.

Mr. Humphrey: Exception.

The Court: And is his answer relative to his belief as to the value of the claim in 1903?

Mr. Humphrey: I will state a further reason in support of my last objection, that neither one director nor two directors could charge off any paper. It is for the board of directors to do that." (Rec. p. 283.)

James E. Davidson, Foss, Andrews, each of the other living directors, were asked what his belief was as to the value of the loans and discounts including the Maltby paper, and the trial court excluded all such testimony, and charged the jury that it was immaterial what they believed about the value of the paper, or of the securities, or the reports which they attested or their reliance on Mr. Bump, the president and active manager of the bank.

This subject will be more particularly set forth in the specification of errors hereinafter.

MALTBY LUMBER CO. AND ALVIN MALTBY.

Alvin Maltby had been in business in Bay City many years; had always done business at this bank, came from the same town as its cashier and president Bump, and had been a successful business man up to the time of his connection with Mosher & Son, who failed for a large amount about 1895. He knew plaintiff from the time he was a messenger in this bank. He had been lumbering and buying timber lands for many years.

He owed this bank a large amount of money, not directly, but as an endorser for Mosher & Maltby, which was adjusted with the bank, before the account complained of commenced; Maltby paying some \$25,000, including turning over to the bank certain timber lands (Rec. p. 291).

He was discharged in bankruptcy in 1893 or 4 (Rec. p. 291), and plaintiff knew this and he was doing business

with Maltby from '90 to '95; bought logs with him and they were friendly till about six months after the Mosher failure (Rec. p. 35).

Maltby began the timber business, dealing in telephone and telegraph poles, ties, etc., in the trade name of Maltby Lumber Co., his wife, Alzina Maltby furnishing and owning the comparatively small amount with which the business was started in 1896.

This business was very successful,—the net profits never less than \$10,000.00 a year and going as high as \$35,000.00 a year, and he paid this bank about \$30,000.00 a year in discounts.

As the business was done with the bank, managed by Bump, the bank was advancing money on bills of lading accompanied by inspection certificates of forest products, telegraph and telephone poles, railroad ties, etc., and also taking assignments of the accounts against the responsible companies which received the property. The financial responsibility of the shipper, whether individual or not, man or woman, made no difference.

The responsibility of Maltby & Co. was immaterial.

A commercial rating made no difference.

Maltby testified that Exhibit V, Rec. p. 293,

“was the land book kept by the Maltby Lumber Company, and shows the lands owned by the company in October 1902. * * *. A good deal of it was fit for farming land.

The Company had between 25,000 and 30,000 acres
 * * * principally in Ogemaw County Michigan
 * * *. Only a small portion of it was held on
 tax title. * * *. A person having a tax title may
 cut the timber from the lands. He may not cut the

timber from lands upon which the taxes are unpaid.
 * * * In 1902 there were no judgments against
 the Maltby Lumber Company. * * *

The inventory Ex. 247, Rec. p. 294, was correct,
 and the item of timber inventoried at \$118,815.50
 was based upon the actual estimates of the timber
 on the lands; the estimates were made by competent
 men.

The same is true of timber in the River Rouge
 yard—\$98,642.77, and so on" (Rec. p. 319).

Lewis testified that he could not recall a single error in
 this inventory (Rec. p. 129.)

Maltby was asked:

"Q. Now coming to the lands, it seems that in
 the inventory of October 31st, 1902, real estate was
 listed at \$54,055.44; on the next page there is a
 charge and credit under Profit and Loss Account
 Real Estate \$64,788.18, that amount being credited
 to profit and loss; then on the last page—Resources,
 October 31st, 1902—Real Estate \$118,833.52—so it
 seems that the amount of the real estate was raised
 from \$54,055.44 to \$118,833.52, why was that done?

* * *

"A. The lands had been listed at a nominal
 value, 'because it made no difference to the busi-
 ness,' but they 'contemplated at that time making
 a stock company of the concern, and putting in the
 lands at what we considered nearly their value
 * * *."

Mr. Maltby thought that the real estate that the Maltby
 Lumber Company owned at that time, with the timber on
 it was worth more than one hundred and eighteen thousand
 and odd dollars, as stated in the inventory.

From Mr. Maltby's experience as a lumberman, he stated that,

"the timber increased in value continuously, because it got scarcer all the time; every piece of timber that is cut is pretty apt to increase the value of what is left. The value of the lands would, also, increase. (H. W.) Sage was holding lands, similar to our own as high as ten dollars an acre; these lands were only put in at five dollars an acre; some of the Sage lands adjoin ours."

The inventory of October 31st, 1902, had been prepared before Mr. Maltby was called before the directors of the bank, and without reference to being called there, and he testified, Rec. bottom of page—

"There was nothing suspicious, that I knew of, in that inventory of 1902, neither then or now.

While I was doing business with Mr. Woodworth (the plaintiff) we were very friendly; I consider that I accommodated him quite often in discounting paper for him; I was associated in business with him and with the firm of Smalleys & Woodworth in Michigan and in Canada; we bought a piece of timber and lumbered it in Canada—lumbered it together; at that time Frank Woodworth did his business at the Old Second National Bank, and I did my business at the Old Second National Bank; the operation in Canada, I think, amounted to some thirty or forty thousand dollars; as to the period of time covered by that operation, I don't remember the dates—commenced about a year or a year and a half before the bank took charge of this property, possibly about 1900 or 1901; we bought the timber together, and we lumbered a part of it; we sawed the logs; I turned over my interest in the balance of the

timber standing there to Mr. Smalley and Woodworth; we bought quite a number of small pieces of land together in Michigan; generally, when we bought this timber, they gave me their paper and I discounted it—paid the cash for it; my credit was good at that time; the business was done mostly through the Second National Bank; we discounted some paper in the other banks; the extent of the Michigan business, in which Smalleys & Woodworth and myself were engaged amounted to probably twenty thousand dollars, possibly more, I don't remember exactly; that was about a year previous to the Canadian business; I don't remember when the firm of Smalley & Woodworth went out of business; during that time, I sometimes helped Mr. Woodworth in his own business by getting his paper discounted and giving him the proceeds of it; he would make his paper to me and I would endorse it and get the proceeds and return it to him; that business was mostly done through other banks rather than the Second National Bank; my credit was good at that time—too good; these accommodations that I put through for Woodworth amounted to forty or fifty thousand dollars, I think, he came to me for accommodations because we were very intimate with each other in our business relations; he would come to me sometimes and say that he didn't know how he was going to meet a certain paper, and I thought I could get it for him and did so."

Referring again to the inventory of Oct. 31, 1902:

"I don't remember whether we actually owned any mills on October the 31st, 1902, or not; we had quite a number of mills sawing for us; I mean by

sawing for us that we furnished the shingle material and they sawed them for us by the thousand; I think afterwards we were obliged to take over some of those mills in order to protect ourselves; that happened because they were in debt for the mills and we had to pay up the indebtedness in order to keep the mills; they had bought the mills of some one else; but they were owing upon the mills and were likely to lose them and we had to pay for them; having paid for our timber at that place we were obliged to take those mills; I think some of those mills were owned by us previous to October 31st, 1902, the date of the first inventory; the shingles mentioned in that inventory were properly inventoried; I am familiar with the shingle business; I have dealt in them twenty-five years; I don't think there is anything, from first to last, stated in that inventory of October 31st, 1902, that is not stated at its fair value (Rec. p. 324)—I think there are many things that could have been valued at more—that were worth more; not to my knowledge is there anything mentioned in that inventory that I did not own at that time; there was no claim for purchase money, any note or lien or of any other sort against any of the timber at that time—might have been some account we owed, but very little—very little, everything in that inventory was practically paid for, all of this different property had been inspected; nothing listed in the inventory was property that had been thrown out, or culled, or did not properly belong in the inventory, there was nothing in there that did not properly belong in there—there was no stuffing, some of the timber mentioned in this land book had been purchased by me with a time limit for

its removal, but I considered that we had enough time allowed in each case to have removed the timber; after I left the employ of the bank, in dealing with this property, I had nothing to do with the sale or disposition of any of it (Rec. p. 363.)

After that I came South and engaged in the timber business; in a general way, there was probably ten or fifteen thousand dollars in unpaid taxes against these lands October 31st, 1902, I won't be positive about that, there might have been less than that; I think that would be a very large estimate."

This testimony of Maltby was taken by deposition at Jackson, Miss., Nov. 11, 1912, nearly a full month before the trial began. He was a witness at the first trial also.

On the books of the Maltby Lumber Company, the purchasing company would be charged with the forest products as soon as shipped to them, while on the purchaser's books it would not be credited until the property had been received, inspected and accepted by them.

LOANS TO MALTBY LUMBER CO. ON BILLS OF LADING.

The loans to the Maltby Lumber Company on bills of lading and assignments of accounts for the property were all made by Bump, and the defendant, Chesbrough, had no knowledge of them until long after they were made, and he then regarded them as good, and was so assured by Bump. Afterwards many of the papers were renewed and in the end a large amount was unpaid. This was not accommodation or one name paper. No loss was discovered until after 1903.

The Maltby Lumber Co. was doing a very large business in buying and selling timber, lath, shingles, poles, ties and

other forest products, owning cedar lands and buying and selling cedar telephone and telegraph poles, railway ties, etc., to the Michigan Central R. R., G. R. & I. Ry. Co., Grand Trunk Ry. Co., Chicago & Northwestern Ry. Co., Western Union Tel. Co., Am. Tel. & Tel. Co. (Bell), Pennsylvania R. R. Co., Detroit United Ry., as well as other railroads, both steam and electric, of unquestioned financial responsibility (Rec. p. 287.)

This was a very profitable business, as may be seen by the prices obtained under the Maltby contracts, et. seq. Ex. 252 (Rec. pp. 345-6-7-8-9.)

None of these companies would accept any draft for anything purchased. They had their own auditing and accounting systems and paid in their regular way, when property was received, inspected, etc., etc., and the companies were all good financially. The comptroller of the currency knew this.

Bills of lading were made out by the Maltby Lumber Company, with inspection bills attached, showing the things sold, their quantity and quality, and these bills of lading were assigned to the bank as security for the advance or discount made and credit given the Maltby Lumber Company. The form of assignment of the account was "pay this amount in regular course to the Old Second National Bank, Bay City, Mich.," and was prepared by the advice of Judge Collins, attorney for the bank (Rec. p. 286).

Neither of these defendants had anything to do with taking this business. The bank had letters from these different companies that when the products were received, inspected, etc., they would pay the bank for them in regular course. Exhibits 171, et seq., Rec. 174 to 185 inclusive.

The account grew large owing to the fact that Alvin Maltby toward the end imposed upon Mr. Bump by duplicating bills of lading, and discounting at the bank two bills on the same carload, invoice or cargo. This was not known to defendants till after 1903.

For instance, a trainload of telegraph poles would be shipped to Pinconning, and the draft, bill of lading, etc., would be discounted at the bank. When reloaded for Chicago, or wherever the product was sold, a new bill of lading, inspection bill, etc., would be made out and discounted at the bank by Mr. Bump for the Maltby Lumber Company.

When investigation was made in the fall of 1902 by Judge C. L. Collins, the attorney for the bank, and a committee, it was found that Maltby had misrepresented the amount due him from the companies for the forest products against which the discounted drafts had been drawn, but this knowledge was not brought home to defendant Chesbrough, he being absent from Bay City.

A committee of Foss, McGraw, Cook and Chesbrough on May 29, 1902, had examined the assets and liabilities and found them correct (Rec. p. 284).

Maltby was called on for a statement and later called before a committee of the board of directors—James E. Davidson, E. B. Foss and Joseph W. McGraw—and security was given the bank on all the real and personal property that Maltby, his wife, or the Maltby Lumber Company had (Exs. 122, 123, 124; Rec. pp. 342-3).

Maltby was before the board of directors November 21, 1902, and produced the inventory of the Maltby Lumber Co., showing a net worth, after all debts paid, of \$185,385.95. In the indebtedness evidenced by Home drafts, \$383,449.63, was included all the drafts held by the bank. This inventory was afterwards checked over and verified, and not a single error found in it.

SECURITIES TAKEN BY THE BANK.

In January, 1903, the bank proceeded to get further security from the Maltby Lumber Company, under the advice of its counsel, Judge Collins. Chesbrough was then living in Chicago.

The general collateral agreement was executed and delivered to the bank Jan. 5, 1903. Exhibit 122. This agreement, in consideration of loans already made, and to be made by the Old Second National Bank of Bay City to the Maltby Lumber Company, and renewals thereof, provided that all bills of lading, shipping bills and all other papers, or documents, or other collateral security held by the bank, should be held as collateral security to every other loan by the bank to such company.

Alzina Maltby, also, gave a bill of sale to Alvin Maltby conveying all her interest in real estate, personal property, etc., etc., excepting only her exemptions, and including the good will of the business of the Maltby Lumber Company, to Alvin Maltby, who agreed to pay all the indebtedness of the Maltby Lumber Company, which was duly executed and delivered, dated June 29th, 1903 (Rec. p. 342).

In addition seventeen deeds were given to James Davidson, who was president of the bank, conveying to him real estate and timber in the following counties in Michigan, viz: Alcona, Arenac, Charlevoix, Cheboygan, Crawford, Emmet, Genesee, Iosco, Missaukee, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon and Wexford, which deeds were duly recorded soon after. Also, a paper was given showing these deeds to be in the nature of a mortgage, and after the bill of sale from Alzina Maltby to Alvin Maltby,

a chattel mortgage was given by Alvin Maltby to the Old Second National Bank, Exhibit 124 (Rec. p. 343).

It was dated June 29th, 1903, and covered all personal property wherever situated belonging to the Maltby Lumber Company, and all the accounts, debts, and bills receivable owing to them. It allowed the personal property to be sold according to the usual course of business, and provided that Alvin Maltby should give his entire time and attention to the business of the Maltby Lumber Company, and not withdraw from the same to exceed three thousand dollars per year from July 1st, 1903.

Twenty-three deeds of real estate, were offered and received in evidence, conveying the lands of the Maltby Lumber Company and the Maltby's; seventeen of these deeds were dated in May, 1903, and six had later dates. The deeds were recorded at different dates in May and June, 1903, and later. They were in the usual form, the grantee being James Davidson, who was president of the bank. These deeds conveyed all the real estate and timber described in the Maltby inventory of October 31st, 1902, and the Maltby land book.

James M. Lewis, a bookkeeper, was put in charge of financial matters in the office of the Maltby Lumber Company for the bank in January, 1903. He had no knowledge of lands or the timber business. Thought it "didn't take much of a man to run a lumber business" (Rec. p. 124).

Inventories were taken each year showing the property on hand, less sales, etc.

In the judgment of the president of the bank and every member of the board of directors the Maltby Lumber Company indebtedness was secure in 1903. There could be a large shrinkage in Maltby assets and still the bank would be secure.

At the time of the trial there was still property on hand that had not been sold.

Plaintiff based his right to recover on the "falsity" of the reports, according to the facts shown by the books of the bank, as detailed in the evidence of the accountant, A. W. Clark, who spent three months in making an examination in 1908, in the employ and pay of plaintiff.

It will be seen that this examination was made six or seven years after the transactions occurred between the borrower in question and Mr. Bump.

There was no testimony contradicting the statement of Mr. Bump when in charge, nor the testimony of Andrews, the cashier, Davidson, the president of the bank, and Foss and the defendants, directors, that the Maltby account was regarded as secured in 1902 and 1903.

At the directors' meeting of Oct. 3, 1902, McGraw thought the bank examiner was present (Rec. p. 217). The minutes do not refer to it.

James Davidson was not examined as a witness on account of his almost total deafness. James E. Davidson (Rec. p. 234).

The estimate of the value of the timber, poles, ties, etc., in the Maltby inventory, might vary according to the market, or the judgment of the person making the estimate, but there is no proof in the record that it was not a fair and correct inventory.

One portion of it, however, was criticized, and that was the addition of \$54,000.00 to the value of the lands over what it was in a previous inventory.

This addition was made, because the value of the lands, timber, and otherwise had appreciated.

The land book Exhibit V, which was very correctly and elaborately kept showed all the lands owned by Alzina Maltby or the Maltby Lumber Company, and upon the trial, no competent evidence was given contradicting it in any particular.

It was said by one of the witnesses Carswell that squatters were in possession of some of the land, but it was not shown that they had any right there, and it was not shown by any competent evidence that any of the lands in the land book were not owned as Maltby represented.

October 21st, 1902, the comptroller of the currency, Ridgely, wrote Bump in substance that from the report of an examination of the bank made on the third inst., it appeared that about 40% of the loans and discounts consisted of drafts on railroad, telephone, and telegraph companies, etc., with shipping bills attached, discounted for the Maltby Lumber Company.

In order to come within the exception of section 5200 relative to discount of bills of exchange drawn in good faith against existing values, etc., the drafts should have been drawn against commodities in process of shipment from seller to buyer, and be accepted by the parties against whom they were drawn, etc.

This letter was laid before the directors at a meeting on October 24th, 1902, at which the defendant, Chesbrough, was not present; the directors present being James E. Davidson, McGraw, Foss and Cooke (Rec. p. 6, bottom).

Defendant, Chesbrough, was not present at any meeting of the bank directors after October 17th, 1902, until March 27th, 1903, except the meeting of November 21st, 1902.

During this time he was living in Chicago on account of the illness of his wife, who was receiving medical treatment there.

At the meeting of October 24th, director J. W. McGraw was instructed to learn the status of the accounts of the Maltby Lumber Company, and on October 31st at a meeting, at which defendant, Chesbrough, was not present, cashier Andrews was directed to write to parties owing the Maltby Lumber Company, asking statements of account.

There was no evidence in the case that the letters received in reply, which usually stated a lower amount due than that claimed by Maltby, were ever brought to the attention of defendant, Chesbrough.

PLAINTIFF WOODWORTH

"knew as he testified, that the loans and discounts contained all the paper of the bank which the directors supposed to be good at the time, but there might be some bad paper in it."

The plaintiff when he left the Bay City High School at 18 was employed in this bank as messenger in 1877, and remained such through 1878, 1879 and 1880, and in 1881 he was check and deposit bookkeeper. He testified "I knew on March 14, 1903, how the bank statements that were published in the newspapers were made up." He had means of knowing how statements and daily reports were prepared. After leaving the bank he was in the saw mill business in one firm or another continuously from 1883 forward; first as a member of the firm of Slater and Woodworth; then in the firm of Smalleys & Co., then Smalleys & Woodworth, and then Woodworth & Co., the firm being composed of Frank T. Woodworth and William A. Smalley. At the same time he was a member of the firm of Woodworth & O'Malley. In 1904, the name

of the latter firm was changed to F. T. Woodworth & Co. They were dealers in lumber and logs.

These different firms with which plaintiff was connected, all kept their accounts, discounted their paper, and did all their banking business at this bank, and he kept his accounts there continuously for twenty-five years.

The theory of the plaintiff set forth in the declaration was that he was misled by the reports attested by defendants, and that his action in buying the stock was based upon the reports. At the trial he testified: "It did not make any difference to me whether it was McGraw's name that was signed to the report, neither did it make any difference whether Chesbrough's name was on the report, or whether it was signed by James Davidson."

Plaintiff testified:

It didn't make any difference to me what director signed it. Three must sign the report, and it made no difference who signed it. Any one that would come in would be asked to sign it. Then the next time some one else may be asked to sign it. This is the way they were signed when I was in the bank. So it did not make any difference to me whether this director or that director signed the report. I did not pay a bit of attention to it. I was governed by what the report reported. At the time of the second report of the condition of the Old Second National Bank, I had not found out whose stock I bought, and I didn't care whose stock I bought, because I had it. It might have made a difference whether one of the directors was selling me his stock. It did not occur to me to inquire. I wanted to buy the stock, and I had it, and that satisfied me. I did not know in April, 1903, that Mr. Cooke, one of the directors, was selling his stock. I did not know who it was that was selling their stock, and I didn't care. I did not

go to Mr. Andrews, or any other officer of the bank, in reference to the statement of the 9th of April, 1903. After the report of April 9th I bought some stock. I didn't know whose stock I bought at that time, and I did not inquire. I did not notice that the loans and discounts had gone lower in April from what they were in February, that in February they were \$1,063,463.00 in round numbers, and that they had gone down. This made no difference to me. I probably noticed the difference between the amount of deposits, but this made no difference to me either. Mr. Clift spoke to me about dividends the time he showed me the first statements. I knew he was acting as a broker, trying to sell me the stock, and it was then he spoke to me about the dividends, but I did not ask him. My father-in-law, James S. Smalley, had held stock in the bank for more than eight years previous, and I knew from him that the stock was paying dividends during the last four years, so that I knew about the dividend without Mr. Clift telling me. It was in 1904 or 1905 when they paid the last dividend. Sometimes I read the statements of the Old Second National, prior to March, 1903. Mr. Smalley did not talk much about his business affairs to his family, although he talked a little about the result on the bank of the Mosher failure. This was in about 1896."

In all Mr. Woodworth's experience in this bank, he had never seen any of the directors verify the comptroller's report to be published, by a comparison with the books of the bank, a counting of the currency, or an examination of the paper held by the bank, or any other method of verification. He knew they took the statement of the officers of the bank, as shown by the books, and sworn to by the cashier to the best of his knowledge and belief to be correct.

For thirty years prior to January 1, 1903, the plaintiff resided in Bay City, was personally acquainted with the officers and employees of said Second National Bank, and knew they were men of integrity and high character. One of them, director D. C. Smalley, in whose family he lived for five years, was his near relative, and one a relative of his wife, and all were his near neighbors and daily associates. In the year 1903 plaintiff was mayor of Bay City.

He married the daughter of James S. Smalley, who lived in his family with him, was a stockholder in this bank and had been such for three or four years before plaintiff bought stock. Edgar B. Foss lived across the street from him, and James E. Davidson lived within half a block on the same street, and he could see each of them almost daily. They were both prominent and successful business men, and plaintiff knew them very well. (Rec. p. 35.)

No stockholder in the bank ever asked Woodworth to buy any of its stock.

While Woodworth was buying stock for himself and his relatives he made no inquiry whatever of Mr. Foss or Mr. Davidson, directors, and his close neighbors, nor of the president of the bank, nor Mr. Smalley, his father-in-law, nor of the cashier of the bank, except he asked Mr. Andrews about the statement and Andrews verified it by the figures.

He knew that the capital stock of the bank had been reduced from \$400,000 to \$300,000 and then reduced to \$200,000. (Rec. p. 36.)

In 1903, the plaintiff endeavored to get proxies from stockholders, Mathew Lamont for one, for the purpose of displacing the defendant, McGraw, as a director, which ultimately led to McGraw's selling his stock through a

broker. He wanted to elect himself and John L. Stoddard directors, which he finally succeeded in doing.

In the reports which plaintiff attested (Exs. 169, 170; Rec. pp. 161, 165), the items of loans and discounts contained, as he well knew, the paper of Maltby Lumber Co. and Maltby Cedar Company, in question here (Rec. p. 43.) He certainly proved by his own action that he knew these reports were only transcripts from the books of the bank. He had been a director for five months at this time, May 29th, and was vice-president of the bank. He signed that report, because it needed to be signed by the directors, and he was willing to sign it when Mr. Andrews asked him to. He made no investigation before he signed it; he didn't know the amount of "loans and discounts" was \$723,703.09. He trusted the bank officials—that it had been taken from the books correctly. He was asked in his testimony at Saginaw in the Smalley case: You knew that meant just the amount of "loans and discounts regardless of their value."

A. That represented the "loans and discounts."

Q. Regardless of their value? A. Yes.

Q. You knew that statement in any report must mean the amount of "loans and discounts" held at the bank on that day, regardless of their value?

A. Yes. (Rec. p. 47, et passim.)

Of his own knowledge, he did not know the truth or falsity of one fact in the reports which he attested.

In 1903, before the plaintiff purchased any stock in the bank, he knew that the items "loans and discounts" in the report to the comptroller of the currency contained the good and bad paper, and knew that all the obligations that the bank held were included in loans and discounts, as the law required, good, indifferent or bad as the case might be. (Rec. p. 47, 4th par.)

Woodworth knew the business career of Alvin Maltby for 25 or 30 years prior to the time that he purchased any stock in the bank; knew that he had failed in business with Mosher, and that all of that time he had done business at the Second National Bank, which held a large amount of his paper.

Woodworth's offices and Maltby's offices were in the Phoenix Building where the bank was located, and plaintiff's knowledge of these men began when he was a messenger in the bank. He was then doing business every day with the firm of Maltby and with Brotherton & Company. Plaintiff knew that Alvin Maltby was connected financially with the firm of Mosher & Co., which failed about 1895, owing the Second National Bank a large amount of money.

He paid no attention to the affairs of the bank after he first began to buy the stock, and said further, that "the reports made between the first report of February, 1903, and the last report in November of that year, made no difference to him at all" (Rec. p. 4).

In the summer of 1903, Mr. McGraw learned that plaintiff was attempting to displace him as a director; the pool being formed in May of that year, and Mr. McGraw did not list his stock for sale until October 30th, 1903, and he sold half his stock (25 shares), because he thought they were going to leave him off the board. (Rec. pp. 189, 190.)

Plaintiff tried to get the proxy of Matthew Lamont, one of the stockholders, to help him unseat McGraw, but Lamont refused him the proxy. (Rec. p. 196.)

In 1904 no attempt was made to displace McGraw, but in 1905 plaintiff succeeded him on the board of directors.

and John L. Stoddard, one of the men in the pool plaintiff wanted to elect, was also elected a director at that time, and succeeded McGraw as secretary of the board.

The plaintiff purchased the stock of brokers at his own instance, and for the purpose of acquiring a majority of the stock by himself and other parties acting with him, in the "pool" of First National Bank stockholders who wanted to consolidate the two banks, in order to get control and thereby secure his election to the board of directors and the presidency of the bank. This defendant wanted to establish by a cross examination of Woodworth which was refused. He purchased \$14,500 of Orrin Bump's stock, for himself and his family.

In October, 1904, the plaintiff, as a stockholder, was appointed a member of an investigating committee to look into the affairs of the bank, and acted as such, and he was elected a director in January, 1905, and received that year the office of vice-president, after which, as a director of said bank, he attested as correct by signing his name thereto, a report to the comptroller of the currency, made January 11, 1905, which was duly published; at which time said plaintiff knew that the bank held Maltby Lumber Company, in form then Maltby Cedar Company, paper to the amount of \$276,000.00 which he knew had not been charged off, and which amount he also knew was included in the item of "loans and discounts" in the report which he signed.

It was shown, also, by the cross examination of the plaintiff that on January 11th, 1905, the next day after he was elected a director, he knew that \$135,000.00 of the Maltby paper was about to be charged off; he knew that all the Maltby paper at that time was in the bank, and in the report which he signed.

The court said in his charge to the jury that even if plaintiff had been wrong in signing the report of January 11th, and also that of May 29th, 1905, that would not prevent his recovery if the defendants were liable, but that clearly showed, and the court should have so instructed the jury that the plaintiff knew at the time he purchased the stock, just as he knew at the time he signed the report, that the report contained what paper the bank had on hand which had not been charged off.

The defendant could not be expected to know in 1903 what was discovered in 1904 and 1905. The same rule should apply to both parties, McGraw sold half of his stock because the pool plaintiff was in was trying to get him off the board, and he finally accomplished that in 1905.

In the statement of January 11, 1905, "loans and discounts" are stated at \$899,821.14. The individual liability of Frank T. Woodworth, vice-president, was \$9,200.00, yet Mr. Woodworth denied in his testimony in the Circuit Court at Saginaw that he was individually liable for anything, notwithstanding the report which he had attested as correct, and he said he signed the report, because Andrews, the cashier, "asked me to."

On May 29th, 1905, the plaintiff attested as correct by his signature as a director a report of said bank to the comptroller, which was duly published, in which report he knew the Maltby Lumber Co. paper, thousands of dollars, changed into Maltby Cedar Co. paper, was included in the loans and discounts reported at their face value, at \$723,703.09.

Defendant Chesbrough was engaged in the manufacture of lumber at Emerson, Chippewa Co., Michigan, and lived at Bay City for several years, and decided to move to

Detroit about 1901—or 2, though he did not actually move there until 1905. He kept his account in the Second National Bank ever since he lived in Bay City.

He did not owe the bank a dollar at any time.

He had been a close neighbor of the plaintiff for a great many years. The firm account of Chesbrough Bros., defendant's firm, was kept there from 1902 or 3. The account would average \$15,000, sometimes it was \$35,000.

He disposed of his stocks and business at Bay City from time to time, selling in 1902 \$7,500.00 of stock in the Phoenix Building where the bank was located; bonds of the Valley Telephone Company; Bay County Electric Company, and stock in National Bank of Commerce, Toledo, Ohio, of which he sold \$20,000. That was a good bank. (Rec. p. 259.) He needed the money.

He offered his Bay City house for sale in 1902, and did not find a purchaser till 1906.

He was at Chicago living at the Hotel Metropole from October 17th, 1902, until the latter part of March, 1903, on account of the illness of his wife who was in a hospital there, and he did not remember attending the directors' meeting of the bank on November 21st, 1902, although the record shows he was present.

He regarded Mr. Orrin Bump, whom he knew very well, "As an A. No. 1 banker and citizen; he stood very high in reputation; I guess he was the best banker in Bay City; his character for honesty, integrity, industry and attention to business was absolutely good."

He, in common with all the other members of the board, regarded the Maltby line as secured by the bills of lading, assignments of account, and later on in addition by the securities turned over by Maltby to the bank.

On May 6, 1902, defendant Chesbrough sold 57 shares, retaining 10 shares of his stock in this bank, as he sold other Bay City stock, because he was about to move to Detroit, to which place he did move in 1905 and has since resided there. He was elected a director in 1905 but resigned.

He also wanted money to use in building a boat, the Kennebeck, and Bump had refused to loan him \$50,000 for that purpose. The Kennebeck cost \$180,000. (Rec. pp. 259, 262.) He bonded her when he did not get the loan. He gave two reasons for selling his stock; 1. He was moving from Bay City, and 2. He needed the money, both good reasons. Chesbrough met Mr. Collins on the street in Chicago, and went with him to probably two (railway) offices. (Rec. p. 239.) Mr. Collins was very general in his evidence as to talks with defendant. (Rec. p. 249.) He made no personal examination then or later.

In 1902, he was building the steamer Kennebeck, and wanted to borrow \$50,000.00 of this bank and was refused. (Rec. p. 288.) The boat was used in connection with his lumber business. Bump asked Chesbrough to remain on the board. (Rec. pp. 303, 308, 393.)

Others sold stock; A. J. Cooke was in poor health and transferred his stock to his wife. Bump sold his stock; he was ill; had resigned and went to live in California; Aaron M. Chesbrough lived in Toledo, Ohio; and sold his, as well as other bank stock at the same time.

No statement or representation, oral or written, was ever made at any time by either of the defendants in regard to the stock of the old Second National Bank or its value, to the plaintiff or any one else, and neither of them had anything to do with selling the stock beyond placing it in the hands of brokers at Bay City for sale.

One Fisher was a witness for plaintiff and testified that defendant Chesbrough told him on a railway train in May, 1902, that this bank "would make a bad loss."

He did not remember the date in May, "it was ten years ago" (Rec. p. 112.) He did not remember that he had testified in this same case on May 21, 1906. (Rec. p. 114.) He did not remember what he had said in this same talk (Rec. p. 115), then he thought he did, etc., when the deposition was read to him (Rec. p. 137). Mr. Chesbrough denied any such conversation. (Rec. p. 270.)

DECLARATION, PLEA AND NOTICE, DEMURRER.

The declaration contained ten counts. The first, second, third, fourth and fifth counts were based upon the publication in the Tribune, a Bay City newspaper, of statements made to the comptroller of the currency, and attested by one or the other or both of the defendants, with the allegation that the reports were false, in that "loans and discounts" were reported at their face value, whereas said item contained papers that were worth much less than their face value.

The first count was based on the report of February 6th, 1903, which it was alleged was attested by J. W. McGraw, E. B. Foss and James E. Davidson. (Rec. p. 3.)

The second count was based on the report of April 9th, 1903, which was alleged to have been attested by James E. Davidson, J. W. McGraw and Frank P. Chesbrough. (Rec. p. 6.)

The third count was based on the report of June 9th, 1903 (Rec. p. 7), which was alleged to have been attested by James Davidson, E. B. Foss and J. W. McGraw. James Davidson and James E. Davidson are different individuals

—father and son—James Davidson was president of the Second National Bank at the time these transactions occurred, and James E. Davidson succeeded him as president.

The fourth count was based on the published report of September 9th, 1903 (Rec. p. 10), which was alleged to have been attested by Frank P. Chesbrough, whereas the first published report bore the name of Fremont B. Chesbrough, his brother, who was not a director, J. W. McGraw and James Davidson. Within a few days afterwards, it was published with Frank P. Chesbrough's name as an attesting director.

The fifth count was based on the published report of November 17th, 1903, alleged to have been attested by Frank P. Chesbrough, J. W. McGraw and E. B. Foss. (Rec. p. 12.)

The sixth, seventh and eighth counts related to the payment of three separate semi-annual dividends of five per cent. each on the capital stock, in December, 1902, and June and December, 1903.

The dividend of 1902 was ordered at a special meeting held on December 1st, 1902, at which the defendant, Chesbrough was not present. (Rec. p. 62.)

The dividend for June, 1903, was ordered at the meeting of May 29th, 1903, and at that meeting defendant Chesbrough was not present. (Rec. p. 65.)

The dividend for December, 1903, was ordered at the meeting of November 27th, 1903, and defendant Chesbrough was present at that meeting. The motion to declare the dividend was made by James E. Davidson, and seconded by E. B. Foss, James E. Davidson, F. P. Chesbrough, E. B. Foss and Joseph W. McGraw were the directors present, defendants being two of five. (Rec. p. 68.)

The ninth count was disposed of by the court of appeals on the first hearing on page 9 of its opinion in the former review where it said, referring to excessive loans: "The comptroller not having claimed a forfeiture, for this reason we can trace no damage flowing from this cause to the plaintiff. Plaintiff's loss was not in consequence of the fact of excess"; so the ninth count on this hearing is out of the case.

The tenth count (Rec. p. 19), was very brief, consisting of three paragraphs and charged that defendants violated the statutes of the United States, naming them, relating to the National Banks as particularly referred to and described in the preceding counts which was referred to, and made part of this count.

The defendant, Chesbrough, demurred specially, assigning eighteen specific reasons therefor (Rec. p. 20), which was overruled (which action was sustained on the first review by the Court of Appeals). Each of the defendants then pleaded the general issue with special notice of their defenses.

The defendant, Chesbrough, gave notice and proved in his defense that the Second National Bank of Bay City was organized under Section 5133 et seq. of the Revised Statutes of the United States, that the bank was managed by a board of seven directors during the period in question.

That no forfeiture of the franchise of the association had ever been declared by the comptroller of the currency or adjudged by any court, and the bank had done business at Bay City continuously since its organization and was still doing business, and continues to this day.

That the defendant never knowingly signed or attested any false or incorrect report.

That in attesting reports he relied upon the oath of the cashier that the reports were correct, and on the honesty and integrity of the officers, agents and servants of the bank, and without the knowledge to the contrary signed the statements which he did attest, in good faith, believing them to be correct.

Each report attested before it was signed by either of the defendants had been signed and sworn to by the cashier, and no question is made in the case that each of these reports, and all the reports including those signed by the plaintiff were correct according to the books of the bank, and were signed by the several directors attesting them. The plaintiff who attested reports to the comptroller dated January 11th and May 29th, 1905, testified on the trial that he did so in good faith.

The action is against two of the seven directors of the Old Second National Bank of Bay City, for damages on account of their attesting statements of the condition of the bank dated February 6th, April 9th, June 9th, September 9th and November 17th, 1903, each of which statements is set forth in the declaration in separate counts.

The substance of the entire declaration was that the two directors sued had violated the Federal Statute:

- a. By attesting false reports, published in the newspaper of given dates.
- b. By "assenting" to the publication of such reports.
- c. By exceeding the 10% limit for loans.
- d. By wrongfully declaring dividends in 1902 and 3.
- e. For conspiring to raise the value of stock that they might sell their stock at a high price.

Upon the trial (Rec. p. 26), plaintiff relied on the first, second, fourth, fifth and tenth counts of the declaration. (Rec. p. 26.)

Defendants contended that count one was out of the case under the opinion of the Court of Appeals, and the trial judge held that he would consider it in the case, and thereupon defendants' counsel objected to any evidence being received under the declaration, which objection the court overruled and defendants excepted.

The declaration was based entirely upon the attesting of the reports set out in the declaration by the two defendants complained against and the payment of dividends. This was affirmative action on the part of these defendants. The declaration was not amended after the first trial.

The second trial proceeded entirely upon a new and different theory; namely, that the Maltby paper should have been charged off before the reports were made. That it was not material whether defendants attested the reports or not.

There is no evidence in the case that at any time prior to November 17th, 1903, the date of the last report, that the directors, as a board, or the defendant Chesbrough, as an individual, had any reason to charge off any of the paper in question, and it was not alleged in the declaration nor proved on the trial that the directors, as a board, had violated their duty in not charging off paper, and thus, two of seven directors were tried for not taking affirmative action; that is, charging off this paper which they could not do, and if they had tried to do their effort would have been entirely ineffectual, because none of the other directors, under the testimony given, thought it ought to be charged off, nor did the comptroller of the currency, nor the official bank examiners who examined the bank from time to time.

It was undisputed on the trial that all dividends were paid under the advice of the bank's counsel, and that they

were ordered paid by a majority of the board, as noted herein, and it was, also undisputed, and was proved affirmatively that the defendant Chesbrough took no part, as a member of the board, in ordering either the first or second dividend, which latter was ordered on Nov. 27, 1903, "on motion of Davidson seconded by Foss."

Plaintiff had bought of a broker, stock of the Old Second National Bank, but none of defendant Chesbrough's stock, and paid the market price for it, at different times from March 14th to December 16th, 1903; his purchase on that day amounting to eighty shares.

From March 14th, 1903, he had been a stockholder, entitled to examine the books of the bank; he had received one dividend of five per cent. December 1st, 1903. This dividend was ordered November 27th, 1903, and both that dividend, and the purchase of the eighty shares was outside the purview of this case, according to the decision of the Court of Appeals limiting time of proof to November 17, 1903.

The reports were true; they were in the form required by the comptroller; the bank had frequently been examined by the National Bank Examiners during the time in question, and they had found the bank all right; they made their reports to the comptroller, and he did not direct any paper to be charged off; he did not direct any reduction of the stock; he did not question any act of the directors, as shown by the record of this case, except the excess loans of over ten per cent. of the capital of the bank, and that is out of the case.

The judgment of the comptroller of the currency was final as to all the contentions made by plaintiff in regard to these reports, and in regard to the solvency of the bank, and the fact that no paper was included in the report which should have been charged off.

It had not been shown that prior to Dec., 1903, the bank had any bad debt, nor that any of the Maltby paper was a bad debt at that time within the meaning of the statute.

There was no evidence offered of any conspiracy either between these two defendants, or either of them, and any one else, but the evidence shows that each of them had honestly discharged his duties as officers, employees and other directors had discharged theirs.

SPECIFICATION OF ERRORS RELIED ON.

There are twenty-eight assignments of error, but several of these embrace several alleged errors of the Court of Appeals, which when they relate to the same subject matter are here grouped in order to shorten the case.

First: The Court of Appeals erred in affirming a portion of the judgment of the District Court, \$16,005.44, thereby affirming the action of the District Court in refusing to direct a verdict for the defendant Chesbrough at the close of plaintiff's case, and at the close of the whole case; the right to renew the motion at that time having been reserved; and also, in overruling the demurrer of defendant Chesbrough, which it did when the case was first before it. 195 Fed. pp. 878-879.

Second: The Court of Appeals erred in not reversing the judgment entirely, and either entering judgment for defendant, or dismissing the action.

The demurrer (Rec. p. 20), was in substance that plaintiff had not stated a cause of action in his declaration; that the only violation charged is by signing, attesting, also permitting, and assenting to the publication of a false report without averring that the report was false in any par-

ticular, which reports had been sworn to by the cashier of the bank, and who, together with all the employes of said bank, were honest and faithful, as defendants had the right to presume; because the third count of the declaration was against defendant McGraw alone, based on the report of June 9th, 1903, which report was not signed by defendant.

The fourth count was based on the published report of September 9th, 1903, which was not signed by defendant, but purported to be attested by his brother, Fremont B. Chesbrough, though afterwards published in defendant's name; the published report of November 17th, 1903, was in form and fact as required by law, which allegations were not controverted.

The objection to the sixth count in reference to dividends was that it stated no cause of action, because defendant was not liable for any error in judgment, which was not negatived, and no bad faith was charged.

The seventh and eighth counts imputed knowledge of the affairs of the bank to the directors, which was only contained in the books and papers of the bank, and did not aver that it was ever brought to their knowledge.

The tenth ground of demurrer was that the ninth count of the declaration, which referred to the loans exceeding the ten per cent limit, and was overruled with the others in the District Court, which ruling was sustained by the Court of Appeals at the first hearing.

The declaration did not allege that the Old Second National Bank was not now and had not been uninterruptedly since its organization prior to 1902, a going concern, in the full exercise of its functions as a national bank; and the fact that the said bank continued to do busi-

ness uninterruptedly as aforesaid by the knowledge and consent of the Comptroller of the Currency of the United States, is equivalent to a determination of the Comptroller of the Currency of the United States, charged by law with the supervision and control of national banks, that it had the right to so continue, and its capital was not impaired.

Because neither defendant as one director, nor both defendants as two of the seven directors of said bank could charge off any paper of said bank as bad, nor could one or two directors declare dividends, and said declaration does not allege that the action of said defendant Chesbrough, or either defendant, prevented any paper being charged off, nor that, at the time alleged in said declaration, either of said directors, or said board of seven directors, knew or believed that said paper should be charged off.

This defendant also demurred to said declaration, because it nowhere appears that said defendant acted negligently in signing said reports, nor that the Board of Directors of said bank did not employ honest and faithful agents, servants and employees; a competent and honest cashier, and honest bookkeepers; and nothing more is charged against them than attesting by their signatures or permitting and assenting to the publication of certain reports prepared by the officers, agents and employees of said bank; without knowledge, participation or direction of this defendant which reports had first been sworn to by the cashier of said bank before their attestation.

Because defendant is nowhere charged, in the first five counts of said declaration, with doing anything more than "knowingly" signing certain reports, and is not charged with preparing said reports, nor with knowing them to be false.

Another ground of demurrer was that no neglect of duty was charged against the Board of Directors as a body, or collectively, only a majority of the board could charge off any bad paper, neither the board nor defendants individually, or either of them was declared against for not charging off paper.

The plaintiff and defendant McGraw, when suit was commenced resided in Bay City, defendant Chesbrough resided in Detroit (Rec. p. 1), all were residents of the Eastern District of Michigan.

The action was one of which the State Court had jurisdiction, although the liability was to be determined by the statutes of the United States.

The Court of Appeals in their first decision overruled the demurrer 195 Fed. 879, and held that count nine was not good. 195 Fed. on page 882. (6.)

At the first trial, plaintiff withdrew from the jury counts 3, 6, 7 and 8, and the court withdrew counts 1 and 10, and submitted counts 2, 4, 5 and 9. (Rec. p. 26.)

At the last trial, the counts relied upon by plaintiff were 1, 2, 4 5 and 10. (Rec. p. 26.)

The first count, so excluded by the judge at the first trial, excluded by the Court of Appeals by defendant's contention was "considered in the case" by Judge Tuttle (Rec. p. 27). It was based on the published report of Feb. 6, 1903, which was not signed or attested by Chesbrough (Rec. p. 3), and he was in Chicago, Ill., at that time and long before and long after that date, and knew nothing about it. (Rec. p. 259.)

The second count was based on the published report of April 9, 1903.

The fourth count was based on the published report of September 9th, 1903, in which Fremont B. Chesbrough's name appeared as an attesting director, and was published also on September 16, with the name of defendant Chesbrough as an attesting director.

The fifth count was based on the published report of Nov. 17, 1903, in which defendant's name appeared as an attesting director.

The tenth count was based on all the preceding nine counts, "as portions of a general design and conspiracy on the part of defendants to deceive the public, including plaintiff, etc."

All the errors herein complained of were before the Court of Appeals on the second hearing and were disposed of by that Court as follows:

"A very large number of assignments of error is presented. Those which do not raise the same questions disposed of on the former hearing we have examined, and we do not find that any one of them is based on prejudicial error. In so far as they do raise again the same questions which we have once determined, we assume that they are now only intended properly to shape the record for review by the Supreme Court." (Rec. p. 419.)

The 20th assignment is naturally connected with the second (Rec. pp. 64-118, 119.) The Court of Appeals in giving judgment for plaintiff Woodworth in any amount, affirmed the trial court in denying defendant Chesbrough's motions for a verdict in his favor at the close of plaintiff's case, and the refusal to direct a verdict in favor of each of the defendants at the close of the case. (Rec. p. 58.) In denying the first motion, at the end of plaintiff's case, leave was given by the court to renew it at the end of the case.

To the denial of each of these motions, due exception was taken.

For the convenience of the court, the motion is here set forth:

“1. Because the plaintiff can not maintain this action against two of the seven directors.

2. Because the plaintiff can not maintain this action at law. Chancery or equity alone being competent to deal with the various questions involved.

3. Because the bank, being now and at all times heretofore solvent, and no forfeiture of its charter ever having been adjudged, and this suit being brought by an individual stockholder, for his sole benefit for injuries which, if they exist, affect all the stockholders in proportion to their holdings, he can not maintain the action.

4. For the reason that no knowledge on the part of these defendants or either of them such as to make them liable under section 5239 of the Revised Statutes of the United States, has been proved in this case.

5. Because if the plaintiff may recover each person who held stock in the Old Second National Bank at the time that any of these matters arose may also maintain an action, thereby enabling each stockholder to bring action in his own name, and permitting as many suits as there are stockholders, against the defendants.

6. For the reason that the reports as published were in no instance, as shown by the proofs, the same as those sent to the comptroller of currency.

7. Because there is no evidence in this case that the defendants, or either of them, had any knowledge of the publication of any report as set forth in the plaintiff's declaration.

8. For the reason that the plaintiff can not recover under the declaration in this case.

9. For the reason that no conspiracy whatever, and no action as between the two defendants, different from the action of the entire board of directors has been shown in any way in this case.

10. Because the declaration does not charge any violation of the National Banking Act, except, "By signing, attesting and publishing and assenting to the publication of a false report of the resources and liabilities of the bank" without showing that the defendants, or either of them, had any knowledge of the making up of said report, or knew that it was incorrect in any particular, which report is set forth in the declaration and sworn to by the cashier of the Old National Bank, whom the directors had a right to assume was honest and faithful before it was attested, if at all, by the defendants. And the testimony shows that the report was not incorrect in any particular. And because the statements and each of them show that each was sworn to by the cashier of the Old Second National Bank, whom the directors had the right to assume was honest and faithful before it was attested if at all, by the defendants. And the testimony shows that the report was not incorrect in any particular. Each of them show that each was sworn to by the cashier. And it does not allege, and there is no proof that the defendants, or either of them, did anything maliciously or fraudulently.

11. Because as to the defendant Chesbrough, the fifth count is against McGraw alone, and is alleged to be based upon the report of June 9th, 1903, which purports to have been signed by defendant McGraw, James E. Davidson, and Edgar B. Foss, when such was not the fact.

12. I move, your Honor, to direct the jury to disregard the third count, because said count is against the defendant McGraw alone, and is alleged to be based upon the report of June 9, 1903, which purports to have been signed by defendant McGraw, James E. Davidson, and Edgar B. Foss.

13. For the reason that the declaration is framed against two of seven directors, and is not against the directors only who signed those four reports in question, nor against all the directors who attested any one of them.

14. Because the proof shows in this case that none of all the reports in question were ever prepared or published in accordance with the National Banking Act, the printed report being prepared by the cashier of the bank by means of a pencil copy, which was sent to the printer regardless of the names of those who actually signed the report which was sent to the printer, and it is not shown that the defendants or either of them had any knowledge of any one of the reports in question which was sent to the newspaper to be published, or had anything to do with its preparation in any form.

15. The jury should be instructed to disregard the sixth count for the reason that it is based upon the report of September 9th, 1903, and the proofs show that it was not attested by defendant Chesbrough. It shows that it was attested by James Davidson, then president of the bank, not a party to this suit.

16. That the seventh count should be disregarded, because it is based on the alleged report of November 17, 1903, which is claimed to have been attested by the defendants Chesbrough and McGraw, and Edgar B. Foss, for the reason that it was not so attested, as shown by the proofs, and it does not state a cause of action against either

of the defendants, and it is not shown that the report complained of was not exactly in form and fact as required by law, with the exception aforesaid.

17. The jury should be directed to disregard the sixth count, relating to the dividend of December 1, 1902, for the reason that it does not state a cause of action. The defendants, nor either of them is liable at law for an error in judgment, if any, no bad faith being charged or proved.

18. The jury should be instructed to disregard the seventh and eighth counts of the declaration, for the reason that knowledge of all the affairs of a bank are what its books and papers show, and can not be imputed to a director for the purpose of charging him with liability.

19. And for the further reason, in regard to the dividend, that only a majority of the directors can declare a dividend, and that when declared, if illegally declared, it may be recovered by the bank, and can not be recovered by an individual stockholder, and for that very reason, that being an asset of the bank, the plaintiff can not maintain an action in regard to it, and it must be recovered in an action by the bank.

20. Next, the ninth count of the declaration states no cause of action, for the reason that it states mere conclusions, and for the further reason that the directors are not responsible for bad debts made by the cashier, or other officer of the bank, for they are not insurers of the paper held by the bank.

21. The tenth count should be disregarded by direction of the court, because it does not state a cause of action, and if it did state any it would be one that enured to the stockholders of the bank and not to the plaintiff.

22. For the reason that said declaration nowhere alleges that the bank has not been examined from time to

time by the National Bank Examiners of the United States, who have made their findings to the comptroller of currency, who has decided all the questions raised by said reports—that is, the reports in question here—in favor of said bank, which decision under the law, covered the matters raised by the declaration.

23. Because the defendant Chesbrough as one director, nor both defendants as two of the seven directors of the said bank, could not charge off any of the paper of said bank as bad; nor could one or two directors declare dividends. And said declaration does not allege that the action of the defendant Chesbrough or the defendant McGraw prevented any paper being charged off, nor that at the time alleged in the declaration either of said directors or said board of seven directors of the said bank knew or believed that any of the paper should be charged off.

24. Because there is no evidence whatever of any conspiracy on the part of these defendants as claimed in the tenth count of the declaration.

25. For the further reason that the proof shows that the defendants, nor either of them, did not act negligently in signing reports, and because it nowhere appears either in the declaration or in the evidence, that the board of directors of said bank did not employ honest and faithful agents, servants, and employes, a competent and honest cashier, and honest bookkeepers. Nothing more is charged against them than attesting by their signatures certain reports prepared by those officers, agents, and employes of said bank, without knowledge, participation or direction of the defendants or either of them, which several reports had been sworn to by the cashier of the said bank before its attestation by any director.

26. Further, because the defendants nor either of them is charged in said declaration with doing anything more than knowingly signing certain reports, and is not charged with preparing said reports or with knowing them to be false in any particular.

27. For the reason that it is shown that the defendant Chesbrough was not present at the meetings of the directors which were held on April 4, 11, 18 and 25, 1902, nor at the meetings of May 2, 16 and 31, 1902. Neither was he present at the meeting held June 27, nor July 11, nor 18, nor 25, nor August 1, 8, 15, or 29; that he was not at the meeting held September 12, nor 19, nor 26, that he was not there on the 10th day of October, 1902, nor at the meetings held on the 24th or 31st of October, 1902; nor was he present at the meetings held November 7, 28, December 4, 12, 19, nor 26th. Neither was he present at the meetings held January 2, 9, 16, 23, nor 30th of January, 1903. Nor at the meetings held on February 6, 13, 20, 27, 1903; nor at the meetings of March 6, 13, nor 20, 1903; nor at the meetings of April 17, 1903, nor May 1, 1903, nor May 29, nor June 12, 26, nor July 3, nor July 10, 17, 24, 31, August 8, 14, 21, 28, nor at the meeting of October 2, 9, 16, and 23, 1903.

Mr. T. A. E. Weadock: I will add to the above that the plaintiff has not made out a case, and that the case proven is not the case alleged in the declaration, and there is a variance between pleadings and proofs. The only thing plaintiff has alleged in the declaration is formal action on the part of Mr. Chesbrough in signing the specified reports.

Fourth Assignment. This is based on the overruling by the Court of Appeals of the 2nd, 8th, 11th, and 40th assignments in that court.

The second related to admitting evidence under the declaration which made no charge against the board of directors as a body, or generally, and no allegation that as a board they had done anything, or failed to do anything which gave plaintiff a right of action under section 5239 R. S.

8th. The trial court admitted in evidence the minutes of directors' meeting of Jan. 3, 1902, Rec. p. 57, at which meeting there was no quorum and defendant did not attend.

The 11th was based on the admission by the trial court of the minutes of meeting of directors and their proceedings on June 6th, Nov. 14th, and 28th, 1902, defendant Chesbrough not being present at either. Rec. pp. 59, 62.

The 40th was based on action of the trial court in receiving in evidence Exhibits 29 to 39 inclusive, Rec. pp. 74 to 76. These were letters from Andrews, cashier, to Michigan Central Railroad Co., Indiana Railroad Co., Western Electric Co., Public Lighting Commission, of the city of Detroit, and replies thereto from Michigan Central Railroad Company, Reserve Construction Company, Citizens Railway Company, Des Moines City Railway Co., Valley Telephone Co., Fire Commission of Detroit, and Toledo & Western Railway Company, in reference to the amounts due the Old Second National Bank on drafts of the Malthy Lumber Company for material sent them. None of these letters were ever brought to the attention of the defendant, Chesbrough, or seen by him.

Fifth assignment was based on the court admitting records of directors' meetings which defendant did not attend.

Sixth Assignment. This is based on the overruling by the Court of Appeals of the points made on the trial against the admission of Exhibits 25 to 47 inclusive.

5th. The court admitted in evidence over defendant's objection as incompetent, Ex. 24, Comptroller's letter of October 21st.

The substance of this letter has already been referred to.

This letter was read to the directors present at a meeting held October 24th, 1902, at which meeting Chesbrough was not present.

A letter, Ex. 26, to Orrin Bump at Washington was sent by Andrews on October 24th, by direction of the board; i. e., James E. Davidson, McGraw, Foss and Cooke giving him a copy of the resolution adopted, stating McGraw would start the first of the month, with letters of authority and introduction to parties dealing with Maltby whose debt then was \$402,060.91,—a reduction since June last of \$63,861.47. They were taking a little new business from him and were trying to handle the account, etc., and had asked him for a statement.

Ex. 27, was a letter to Bump dated May 13th, '03, from T. P. Kane, acting comptroller, referring to the Maltby Company paper as not being commercial paper under section 5200 R. S., and "should be reduced to 10% of the bank's capital as soon as it can be safely done." Rec. p. 72.

Ex. 28 was the reply, dated May 19th, 1903, in which it was stated,—“The line of the Maltby Lumber Company consisting of drafts on railroad, telephone and telegraph companies, is receiving the most thorough attention of the officers and directors of the bank. We have just taken a line of real estate security on account of the same, and have now in contemplation to proceed in the reduction of their line with us as fast as can be done with safety.

Respectfully yours,

M. M. Andrews, Cashier.”

Objected to as incompetent, overruled; exception for the defendants.

The Court: I will admit this in evidence simply on the question of knowledge of this line and the conditions surrounding it. I propose to permit the plaintiff to show the complete history of the transaction. No recovery can be had in this case, because of the "excess of ten per cent." line.

Exhibit 24, being the letter of the comptroller to Bump, the president of the bank.

Was objected to as incompetent; Mr. Chesbrough not having been at the meeting at which it was submitted to the board, and there is no evidence that this particular letter was ever brought to his attention. Rec. p. 70.

The court overruled the objection, and admitted the testimony.

The cashier, Andrews, who produced these letters from the papers of the bank, said:

"These letters were referred to the board upon receipt of the letters from time to time. They were filed away afterwards."

The attorney for the defendants said:

"The letters should not be read until I have an opportunity to cross examine the witness regarding each letter as offered; unless any particular letter was brought to the attention of the defendants, they would not be competent in the case.

The Court: They are part of the history of the case. The jury will not consider anything not within the knowledge of the defendants.

To which ruling, counsel for the defendants excepted."

Whereupon the attorney for the plaintiff asked Mr. Andrews, on direct examination:

"Q. What do you say in regard to your keeping the members of the Board posted in regard to the Maltby accounts?

Counsel for defendant Chesbrough: Neither of these defendants might be present and yet a majority of the Board might be in session.

The Court: Objection overruled. Exception."

Referring to Exhibit 29, Mr. Humphrey asked leave to ask the witness a question, and did ask.

"Q. Did you show Exhibit 29 (letter of Oct. 31 to M. C. R. R. Co.), to McGraw?

A. I could not say I did.

Q. Did you show that letter, and that reply to Mr. Chesbrough?

A. I could not say positively.

Mr. Humphrey: I ask that that letter be stricken out until it is shown that they have seen it.

The Court: The motion is denied. Exception."

The McGraw report (Exhibit 223, Rec. p. 218), was not seen by defendant Chesbrough. McGraw thought he made the report to the directors, not Chesbrough, about Dec. 15th, 1902. McGraw and Chesbrough were lumbermen, that is men dealing in lumber and logs, Maltby's business was a timber business; he dealt in cedar telegraph and telephone poles, ties, shingles, etc., a very different business and McGraw had no experience whatever in such a business as Maltby's. Neither was Carswell a cedar timber man. He was an inspector of ship timber in the employ of Davidson, and knew nothing about Maltby's business. McGraw made a very superficial examination, for it was not possible to do anything else in the time he took.

But whatever the report showed it did not affect defendant Chesbrough for he never saw it, or knew what was in it.

McGraw's report was not made nor any investigation begun by him until long after Collins' casual meeting with him in Chicago, for that was in late October or early November, 1902.

Seventh assignment was based on overruling the 9th, 112thA and 114, errors assigned each being directed to excluding evidence of custom in other banks in Bay City, in reference to reports, etc.

The reference to 31st and 32nd assignments in this connection is erroneous.

The court refused to permit the defendants to show by Frederick P. Browne, cashier of the First National Bank, of Bay City, and by the cashiers and directors of the other banks in Bay City that it was the usual custom of directors in Bay City during the time in question, in this case, to attest the reports of the condition of the banks in which they were officers, relying upon the sworn statements of the officers of the respective banks, who were honest men, that the statements were correct.

Mr. Browne was offered as a witness on the former trial, and it was agreed on this trial that his testimony, as it appeared in the printed record of this case, should be offered as if the witness in person were present (Rec. p. 366).

The court held that custom was immaterial, and excluded the testimony, to which defendant excepted (Rec. p. 367).

The witness was asked these questions:

"Q. State whether or not, during your incumbency of the office of cashier of the First National

Bank, it has been the custom of the directors of that bank who were called upon to attest the report, from time to time, which was sent, to the comptroller, to sign the report when prepared and verified by the cashier, making no further examination of the affairs of the bank than, in some instances, to compare the report with the previous report, or with the daily statement of the bank, to see whether or not it actually compared with the statement?

Objected to as leading, incompetent, irrelevant and immaterial; objection sustained and defendants excepted.

Q. State whether or not, in any case, any director of the First National Bank of Bay City, who was called upon to attest a report sent to the comptroller, made any other investigation of the affairs of the bank prior to his attesting the report than to look at the books of the bank and see whether or not the statement compared with the book?

Objected to as before; objection overruled and defendants excepted.

Mr. T. A. E. Weadock: In connection with this testimony, I offer to show by the directors of the several banks in Bay City, the same things which I offered to show by the last witness; to this the same objection was made and the same ruling and defendants duly excepted.

The Court: The testimony may be made to appear in this record as having been offered and excluded entirely on the ground that it is irrelevant and immaterial to this issue. You may have the benefit as though you had called the witness and had him here" (Rec. p. 367).

Eighth and Ninth Assignments. The record of the meetings of directors on May 31, 1902 (Rec. p. 59), when a dividend of 5% was ordered, also of June 6, Nov. 14th and 28th, 1902 (Rec. p. 62), were not admissible against defendant Chesbrough, for he was not at either of the meetings.

The directors never agreed on what any report should be, and took no action in regard to them. As to executive action on management that would be discussed, then when agreed to action was taken.

Tenth Assignment. This is based on the overruling by the Court of Appeals of the 14th to 19th assignments inclusive, as well as the 21st and 23rd assignments of error before that court.

The 14th was there based on receiving in evidence the report of February 6th, 1903, for the reason that it was attested by McGraw, Cooke and James E. Davidson; therefore, not the report set out in the declaration nor was it signed by defendant Chesbrough.

The 15th was based on the denial of a motion to strike out this report, and the evidence relating thereto.

The 16th and 17th were based on the error of the trial court in receiving in evidence the report of February 6th, as published in the newspaper relating to that day, and also the report published in the same paper on October 13th and 15th, for the reason that the law contemplated but one publication of the report.

The 19th error assigned was in receiving in evidence the reports of June 9th, as published in the newspaper, Bay City Tribune, on June 13th, 14th and 15th, for the reasons above given.

Defendant had nothing to do with the publishing of any report, and as stated before, the report of Feb. 6th was not signed by defendant Chesbrough (Rec. pp. 2, 30, 31).

The 21st assignment of error in the Court of Appeals was based on receiving in evidence the report of Sept. 9th, 1903, and the various publications of said report in the newspaper, and the 23rd assignment in that court was based on the trial court admitting in evidence the published report of November 17th, 1903, and the various repetitions thereof.

Eleventh Assignment. This is based upon the statement of plaintiff's counsel found on page 33 of the record.

"I contend that, for the present, any statement made in this case and that report was made from the books of the Old Second National Bank, kept under the directions of both of the defendants, with the knowledge that the paper of the Maltby Lumber Company to the extent of \$220,000.00 was not then charged off, and it was, also, published with the knowledge of both the defendants, that such report would be published from the books of the bank, and would so report the condition of the bank, when it should have been charged off a year ago.

Mr. T. A. E. Weadock: I object to that as an improper statement before the jury, and the further objection that the books he says were kept under the direction of the Board of Directors, of which these defendants were two. So far as the directors were concerned, the Maltby line was considered perfectly good at that time by all the directors.

Mr. Humphrey: Mr. John C. Weadock says, that it is false, and these two defendants knew it.

The Court: I will say to the jury now, that you

will pay no attention to what counsel on either side of the case says. You will take the facts relating to the case from the witnesses, and the two important questions that will be for your consideration, will be, what was the value of the Maltby Lumber Company claim, and the other important element will be, when you decide what it was worth, did the two defendants or either of them, know that. Of course, knowledge on the part of one would not be binding on the other, unless he, too, has the same knowledge. So that all the way through, you must try to find out what knowledge each of the individuals had. I think the statement I have made before, and can make again, will be sufficient for you to say each time when the proofs come in, which one of the parties had knowledge, which question you must consider from the testimony introduced. If this claim was worthless, and the two defendants did not know it, they would not be liable, but if they did know it was worthless they would be liable, but if only one knew that it was worthless, and the other did not have this knowledge, the former would be liable, and the latter not."

Twelfth Assignment. "At the time of making this purchase, I relied upon the statement published in the 'Tribune' that morning (Sept. 16th, 1903), and had no other knowledge of the then condition of the Old Second National Bank."

This was duly objected to; the objection overruled, and an exception taken.

Plaintiff was permitted to state, on direct examination, that on December 16th he bought ten shares of Old Second National Bank stock for \$1,470.00 relying upon the

statement of November 17th, 1903, as published in the "Tribune," and he was asked by plaintiff's counsel:

"Mr. Woodworth, did you rely solely upon this statement, or did you rely upon anything else than the statement, any other information you might have with respect to any of these purchases?"

This was objected to as having been fully covered—a mere repetition. Objection overruled, and an exception taken.

The witness answered:

..* * * When I made the purchase on December 16th, I went to Mr. Andrews at his office, and he took off a statement of December 16th, and it showed up practically the same. There was no other information that influenced me in making the purchase of stock. The fact that they paid five per cent. dividend influenced me to buy the stock."

The Court received in evidence the reports mentioned in the declaration, and not only one published copy of each report, but as a rule three published copies of each report, while the law requires but one publication, and it was shown by the record that neither of the defendants had anything to do with the publishing of any report at all.

The report of February 6th was not signed by Chesbrough, and the Court's attention was called to this at page 32 of the record.

It was further stated to the Court, that the law required the report to the comptroller to be made exactly the way it was made, and the fault, if any, was a fault of the board, because only the board could charge off any accounts. If any wrong was done, it was the Board's wrong, and as two men, under no circumstances, could act for the Board, the

testimony was not competent. It would be idle for two to attempt to charge off paper, when they knew the other directors would not agree to it, unless they alone had different knowledge.

Thirteenth Assignment. The Court erred in admitting in evidence the proceedings of the directors meetings, when neither of the defendants was present, and when only one of them was present without due caution. This was objected to by defendants' counsel, for this reason; the objection was overruled and defendants excepted. The articles of organization and by-laws of the bank were also admitted, over defendants' objection that they were incompetent and immaterial, because the statute fixes the power of directors, and they could not make their own duties greater or less.

The record shows that at many of the meetings in 1903, neither of the defendants were present; at others, only one.

The Court erred in admitting in evidence the minutes of the directors' meetings of June 6th (Rec. p. 59), November 14th (Rec. p. 62), and 28th, 1902 (Rec. p. 62), because defendant Chesbrough was not present at either of said meetings.

The Court received in evidence, over defendants' objection, the various tabulations, lists and amounts prepared by plaintiff's accountant, A. W. Clark, who made an examination of the books and papers of the bank over six years, beginning on November 2nd, 1908, after the discounts complained of had been made. He took three months to examine the bank books under the employment and pay of plaintiff, examining the years 1902-3 and 4.

He was unfamiliar with American bank book-keeping, or the American banking system, having had his experience in

Canada. All the testimony he gave was based on the figures and the record that he found in the bank.

In tracing the history of certain drafts he made charts each several feet long, which are summarized in Exhibits 154 to 160, purporting to give what appeared in the books of the bank down to 1904, none of which was brought home to defendant Chesbrough.

Fourteenth Assignment. This is based on overruling the 32d, 10th, 88th and 16th assignments by the Court of Appeals.

Thirty-second Assignment. The minutes of the directors' meeting of May 31st, 1902, in reference to the declaration of a dividend of five per cent. out of the earnings of the past six months was admitted over defendants' objection, also of May 29th, 1903, at which meeting the defendant Chesbrough was not present.

The other dividend referred to was in 1903, which was ordered at a meeting on November 27th, and that was after the defendant had bought his stock, and was incompetent and inadmissible under the opinion of the Court of Appeals, 195 Fed. 888, par. 2, that any evidence of facts after November 17th, 1903, was inadmissible.

The Court erred in admitting in evidence, the daily statements of the bank of the dates when dividends were voted, and also of the dates when dividends were payable; namely, May 29th, June 1st, November 27th, and December 1st, all in 1903.

The Court erred in permitting the plaintiff to answer the—

“Q. Had you received any dividends on this stock during the time that you held it?”

This was objected to as immaterial and incompetent, and not proper re-direct examination.

"A. First year that I owned it, I received five per cent. semi-annual dividend, nothing after it."

The third assignment is based on admitting evidence at the second trial under the declaration, of the payment of dividends, on May 29 and Nov. 27, 1903, which were paid under the advice of the bank's counsel (Rec. p. 240).

Defendant Chesbrough was not present at the June meeting when the dividend was ordered (Rec. p. 65). He was present at the meeting on November 27th, but there was no evidence in the case that Chesbrough ever heard or knew anything about the payment of this dividend, and it was after Nov. 17, 1903, and therefore not admissible under the first opinion of the Court of Appeals.

195 Fed. on p. 888, par. 2.

The 10th related to admitting in evidence minutes of directors' meeting held on May 31, 1902, which ordered the dividend and which defendant Chesbrough did not attend (Rec. p. 59).

The 88th related to the statement of dividends paid by the bank, from 1897 to 1903.

Defendants' counsel objected, etc.

The Court: I will permit the plaintiff to put it in at this time, so that it may be consecutive. You may have the exception.

Defendants' counsel: I will take the exception.

This statement was as follows:

June 5, 1897 and December 3, 1897, dividends of 2½ per cent.

December 1, 1899, dividend of 3 per cent.

June 1, 1900, November 30, 1900, May 29, 1901, November 27, 1901, May 31, 1902, December 1, 1902, May 29, 1903 and November 27, 1903, dividends of 5 per cent.

The Court erred in admitting in evidence, the daily statements of the bank of the dates when dividends were payable; namely, May 29th, June 1st, November 27th, and December 1st, all in 1903.

The Court erred in permitting the plaintiff to answer the—

“Q. Had you received any dividends on this stock during the time that you held it?”

This was objected to as immaterial and incompetent, and not proper re-direct examination.

“A. First year that I owned it, I received five per cent. semi-annual dividend, nothing after it.”

The ruling on what was called the “History of the Case,” the admission of testimony relating to matters after Nov. 17, 1903, was objected whenever offered, and a motion was made to strike out all such testimony as incompetent under the first opinion of the Court of Appeals, which motion was denied (Rec. p. 373).

Defendant Chesbrough requested the Court to charge the jury as follows on the subject of dividends: (Rec. p. 376, No. 15).

“I charge you that if you find from the evidence that the Board of Directors of the bank, as a board, believed that the Maltby Lumber Company paper was collectible and would be paid, that they had a right to declare and pay the dividends paid by the bank in the year 1903, which are complained of by the plaintiff in this case, and that under such cir-

cumstances the payment of the dividends would constitute no evidence showing or tending to show liability upon the defendants in this case, or either of them, on account of the claimed losses suffered by the plaintiff through his purchase of the capital stock of said bank."

This request was not given, only a portion of it, (Rec. p. 384) and so modified and qualified that it was denied in substance.

15th Assignment. Under this assignment the various rulings which related to charging off paper are grouped. They are covered by the 25-28, 32-3, 68, 97, 99 and 120 errors submitted to the Court of Appeals.

25th. The Court erred in making the following statement to the jury:

"For the benefit of counsel, I will say that I am trying the case on this theory, that the plaintiff is permitted to show these entire transactions through the bank, and then the part that these defendants or either of them took in the transactions and then as soon as that has been done, I will permit the jury to say whether or not at the time these reports were made or previous thereto, the Board of Directors should have charged off that or a certain amount of the Maltby claim and whether or not these defendants or either of them knew at that time or previous thereto, that such amount or any portion of it should have been charged off and if a certain amount should have been charged off, and they knew it should have been charged off, was that report of the bank showing its condition brought to the attention of the plaintiff, and was the plaintiff thereby deceived and thereby induced to pay the price he paid for the bank stock."

To which ruling, counsel for defendants excepted.

26th. The Court erred in receiving testimony in reference to the condition of the bank, or the proceeds of the securities taken by the Board of Directors in 1902-1903 from the Maltby Lumber Company after the date of November 17th, 1903.

28th. The trial Court erred in permitting the plaintiff to be asked :

“Why more of the (Maltby) paper was not charged off in January, 1905?”

and then answered :

“The reason they did not charge off any more was, because they did not have surplus enough to do that.”

The Court, also, erred in permitting the witness to answer the

“Q. Whether the Maltby paper was in the bank at the time you (plaintiff) made the statement to the comptroller of May 29th, 1905, and whether it was a short time afterwards charged off to profit and loss?”

This was objected to as incompetent. The objection was overruled, and the defendants excepted. Witness answered—

“It was charged off at different times, as the bank earned enough to do it with any small amount, until, I think, it was entirely wiped out, the other \$100,000.00.”

The Court erred in requiring Mr. Andrews to answer the questions :

“What do you say as to whether all the directors of the bank understood and were acquainted with

this practice (of making reports for publication)?"

"I suppose they were informed about it in a general way."

"To the best of your knowledge and belief, will you state what objection, if any, any of them ever made to that method?"

Which questions were objected to by defendants' counsel as immaterial and incompetent. The objections overruled, and the witness answered:

"I can not recall now, they may have done so."

Also, in requiring the said witness to answer the

"Q. Have you here the profit and loss account, showing when the first amount was charged off, from the Maltby Lumber Company paper?"

This was objected to as being after November 17th, 1903, and objected to as incompetent, for the reason it was nearly two years later; Mr. McGraw was not there at that time, neither Mr. Chesbrough. The Court overruled the objections and admitted the testimony.

The entry in the profit and loss account of the Old Second National Bank made February 20th, 1905, was Maltby Cedar Company (successors of Maltby Lumber Company), \$135,000.00.

This was objected to as incompetent, as occurring after the date of November 17th, 1903, and defendant, McGraw, not being then a director of the bank.

Also, in requiring said witness to answer the

"Q. And now, will you state the entire amount of the Maltby paper that was finally charged off to profit and loss, and show it by the books of the Bank?"

Defendants' counsel objected, which objection was overruled, and the witness answered:

"This book shows \$155,000.00."

68th. (Rec. p. 196). Upon the cross-examination of Andrews, when a witness for defendants, counsel for plaintiff asked him—

"Q. You stated that none of the directors made any effort to charge off any paper up to November 17th, 1903, I want to carry that down to December, 1903, was that true?

This was objected to as being after November 17th, 1903, and therefore, incompetent and immaterial, which objection was overruled, and the defendants excepted.

The witness answered—

"I don't recall that any effort was made or any discussion in the matter. Not to my knowledge was the effort made by Mr. McGraw or Mr. Chesbrough any more than by anybody else. The bank examiner merely examined the books and money, and discounts in the bank; that was his business. He did not examine the letter files of the bank, nor did he examine what personal memoranda I had; neither did he go and personally examine the Maltby Company office."

97th. Immediately after this, counsel for plaintiff asked defendant Chesbrough, on cross-examination, referring to the Maltby paper—

"Q. You did find out it was bad, didn't you?"

This was objected to as incompetent, irrelevant and immaterial, and not proper cross-examination, which objection was overruled, and an exception taken.

The witness answered—

"I don't remember."

The witness was then asked—

“Q. But at the same time, you did find out it was bad?”

A. “Some of it.”

Q. “To what extent?”

To this the same objection was made; same ruling, and exception for defendant, and the witness answered—

“I don’t remember.”

Q. “You found out it was bad to the extent of over \$225,000.00—did you not?”

This was objected to as incompetent, and not proper cross-examination.

The objection was overruled, and the defendants excepted.

The witness answered—

“I wouldn’t say I did.”

He was then asked by plaintiff’s counsel—

“Q. You charged off over \$200,000.00 of paper as bad while you were in the bank?”

To which the same objection, ruling and exception were made.

The witness answered—

“Was I a director when that was charged off?”
And plaintiff’s counsel in the form of a question said—

“‘You were a director in 1905, were you not?’
And the witness answered—‘I don’t remember whether I was a director when it was charged off.’”

The Court charged the jury—

“The underlying fault, if any such was committed in this case, was in the failure of the Board of Directors of the bank to write off such part or por-

tion of the loans and discounts as they then knew to be bad, if any."

There was no proof in this case that the defendant Chesbrough at any time prior to November 17th, 1903, knew any paper to be bad, and there is no evidence that any member of the Board of Directors thought it his duty to charge off any paper, or to ask any other director, or the board to do so.

124th Assignment. The Court also charged the jury—

"If the defendants knew that the paper in the bank in loans and discounts would appear in the five reports each year, and 'it is my memory of the testimony that they both admitted that they did,' it is not important whether both of them or either of them attested each report."

This was submitted to the jury; an entirely different case from that declared upon by the plaintiff, namely, the attesting of a false report, which report, upon the last trial, was conceded to be a correct statement of the books of the bank.

125th Assignment. The Court also charged the jury—

"For these reasons the act upon which liability depends is not the signing of the report itself, but the failure to make reasonable personal efforts to induce the board to charge off assets which have become worthless, if assets have actually at that time become worthless, and are at that time known to said director to be worthless."

If, as a matter of fact, none of this paper at the time the reports were made, was known to be worthless by these defendants, and was considered good by the defendants, the other directors, no director, of course, would attempt

to charge it off, because in his judgment, and under his sworn duty as a director, it ought not to be charged off, and because, years afterwards, the paper turned out to be bad, or doubtful, or caused a loss of part of it, that does not prove that the paper should have been charged off years before, when the directors thought it was good.

17th Assignment. (69th). Mr. Andrews, cashier of the bank, called for defendants, was asked by Mr. Humphrey on re-direct examination,

"State whether or not in 1903, you heard talk among the directors of the bank that the Maltby Company loan was perfectly secured?"

This was objected to as hearsay. Objection was sustained; the testimony excluded, and an exception was taken for the defendants.

He was, also, asked—

"Q. Mr. Andrews, after the deeds and bills of sale were given by Maltby to the Old Second National Bank or to James Davidson as trustee of the bank, transferring all his property, you may state whether or not you heard it discussed among the directors that they considered the loan of Maltby perfectly secure and the security good, and worth every dollar of it?"

To which the same objection was made. The answer was excluded, and an exception was taken for the defendants.

78th. The trial Court refused to permit the defendants' witness, Andrews, to answer the—

"Q. Now, Mr. Andrews, state whether or not any loss was made in this Maltby Lumber Company matter by reason of the fact that any of the companies or individuals that the Maltby Lumber Company

had sold material to, had not accepted the drafts upon them or the assignments made by Maltby to the bank?"

This was objected to by plaintiff's counsel as leading and argumentative, and calling for a conclusion.

The Court sustained the objection, and the defendants excepted.

The question was repeated in a simpler form; a similar objection was made, and the Court sustained it.

"Mr. T. A. E. Weadock: I don't think I have made myself clear; my point is: If the drafts had been forwarded for acceptance, and had been accepted and paid, there would have been no loss on those drafts.

Now, the drafts were not forwarded for acceptance, because these different companies would not accept drafts; that was not their way of doing business, but the only amount that would be collected by the Lumber Company would be the amounts due from these different companies to Maltby, that were assigned to the bank, and that assignment was made good by the acceptance of the assignment by these different companies. Now, my question is, whether in any case any money was lost to the bank, because the drafts were not forwarded. Or, in other words, what they actually did do after the transaction as it worked out, all the money what was due from these different parties to the Maltby Lumber Company, was paid after this assignment."

79th. The Court erred in refusing to allow the witness, James E. Davidson, one of the directors of the bank, to answer the—

"Q. State what you did with reference to the signing of that report?" (Sept. 9th, 1903.)

Plaintiff's counsel objected to why he signed it; it was immaterial. The objection was sustained, and the court excluded the testimony.

President J. E. Davidson was asked:

"Q. What assurance, if any, did Mr. Bump, the president of the bank, give you with reference to the line of the Maltby Lumber Company prior to November 17th, 1903?"

This was objected to by plaintiff's counsel as immaterial, and which objection the Court sustained—excluding the testimony, and defendants excepted.

83rd. The Court erred in permitting the same witness to answer the—

"Q. In 1902 and 1903, after the securities had been given to the bank, after Mr. Lewis, about the first of the year, had been put into the Maltby office—or before that time—did you regard the Maltby line of paper as secured?"

This was objected to as immaterial, leading and suggestive, which objection was sustained. The answer was excluded, and the defendants excepted.

84th. The defendant, Frank P. Chesbrough, a witness in his own behalf, on direct examination, was asked, in reference to the report of April 9th, 1903—

"Q. Did you believe that the loans and discounts that you had on hand were worth, as far as anybody could estimate (the business that you had on hand) the amount listed in the statement."

This was objected to as leading, and the Court excluded the answer, which the defendants excepted.

85th. Defendant Chesbrough, on his direct examination, was asked—referring to the commercial rating of

Maltby and his carrying on his business, and he (witness) stated that he relied upon Mr. Orrin Bump in reference to that matter.

The witness was then asked the—

“Q. And who did the other directors rely on in reference to that matter, at the same time?”

To which plaintiff's counsel objected, as to what anybody else relied on.

The Court: It is excluded.

Mr. T. A. E. Weadock: We have the exception.

86th. The witness had been testifying as to the security which the bank had for the Maltby paper in April, 1903, and he was asked—

“Q. At that time, did you believe that paper to be secured?”

This was objected to as leading, which objection was sustained, and the defendants excepted.

Referring to another objection, the Court said of this same witness,

“He may state what he believed.”

87th. Defendant Chesbrough, on his direct examination, was asked—

“Q. And when you signed these two reports in April of 1903 and in November of that same year, did you believe that the loans and discounts listed in that report, so far as they included the Maltby Lumber Company paper, was good?”

Objected to as leading.

The Court: It is leading. The objection is sustained.

Mr. T. A. E. Weadock: Note an exception.

104. Plaintiff's counsel asked Director Foss—

“Q. Why did you sign these reports, Mr. Foss?”

(Referring to the reports attested by him.)

This was objected to as immaterial, as Mr. Foss was not a party to the case.

The Court excluded the testimony, and defendants excepted.

105. Thereupon plaintiff's counsel asked said witness Foss the—

“Q. At the time you signed those reports, Mr. Foss, did you believe the reports to be true?”

Same objection, ruling and exception.

Also the—

“Q. At the time you signed those different reports, what was your judgment as to whether or not the reports were a correct transcript of the books of the bank?”

Same objection, ruling and exception. The testimony was excluded, and similar testimony was not admitted at any other time.

106. Foss, one of the directors of the bank during all the time in question, on his direct examination, was asked—

“Q. And what information did you have from Mr. Bump in 1902, say the 1st of May, 1902; what information did you have from him as to the status and condition of that line of discounts?” (Maltby.)

“Mr. Clark: We object to that as hearsay. The defendants have already stated what Mr. Bump told them, and what he told some one else is incompetent and hearsay.”

The Court excluded the testimony, and counsel for defendant excepted.

The witness was then asked—

“Q. At the time you signed those different reports to which I have called attention, namely, the reports to the comptroller, how did you regard the Maltby line of discounts.”

Same objection, ruling and exception.

107. The same witness having been asked about the securities for the Maltby line, the extent of his business, etc., was asked—

“Q. Did you regard the Maltby paper during the time prior to Nov. 17th, 1903, as secure?”

This was objected to. Objection sustained, and the defendants excepted.

The same witness, on direct examination, having stated that he got his information, in reference to the Maltby Lumber Company line from Mr. Bump, was asked—

“Q. State whether or not the board of directors relied upon Mr. Bump's statement?”

This was objected to on the ground that the witness can not say what somebody else relied upon; which objection was sustained, and the defendants excepted.

Thereupon the witness was asked—

“Q. State whether or not you relied upon the information given you by Mr. Bump with reference to the Maltby line?”

This was objected to as immaterial; which objection was sustained, and the defendants excepted, and the answer to each question was excluded.

The Court: Yes, what he thought at that time is not competent to this issue. It is excluded. To which ruling the defendants excepted.

The witness had stated that the Maltby line was secured by the bills of lading, assignments of accounts, and the certificates of inspection, and later on by the property, the real estate, the general collateral agreement, the chattel mortgage, and bill of sale, and he was asked the—

“Q. What was the judgment of the board at that time as to whether or not this account was secured?”

This was objected to as immaterial as to this witness, **coupled with the statement**, that as far as concerns other members of the board he can not know.

The objection was sustained, and the defendants excepted.

Sixteenth Assignment (131st). The Court erred in charging the jury, as follows:

“Plaintiff was not compelled to sue all of the directors who signed the reports or who served during the years complained of, but he had a right to select the two defendants, and to sue them alone if he desired.”

Eighteenth Assignment. The trial court required the witness James M. Lewis, a bookkeeper and insurance agent who was put in charge of the office of the Maltby Lumber Co. by the bank in Jan. 1903, to answer, over defendants' objection that it was leading and incompetent, the question:

“To what extent was your connection with the bank kept secret if at all?”

This was objected to as incompetent and leading, overruled and the witness answered:

“It was supposed to be a secret to everybody except Maltby and his son” (Rec. p. 118).

Defendant Chesbrough was in Chicago and had nothing to do with the arrangement.

Nineteenth Assignment. (43rd). Assignments relate to ruling objected to and excepted in reference to the plaintiff's witness, James M. Lewis, who was a bookkeeper and office man, bookkeeper for Maltby in the wholesale grocery business, and had never been anything else.

He was asked by plaintiff's counsel whether after he entered the Maltby office in January, 1903, as an employee of the bank :

This was objected to as incompetent and leading. The objection was overruled, and the defendants excepted. The witness answered :

"It was supposed to be a secret to everybody, except Mr. Maltby and his son. The other clerks were not supposed to know I was there for anything more than a hired clerk in the office. My duties were to look after the finances, open the mail, and take care of the bank account. Mr. Alvin Maltby was the apparent manager of the business. Alzina Maltby was not active. I don't remember whether Mr. Maltby was paid a salary or not. He gave his entire time to the business from January 1st, 1903, to the fall of 1904."

It was plaintiff's contention that the securities realized all they were worth, thus showing that the securities were insufficient when taken, while the defendant's contention was that in 1903—the Maltby Lumber Company debt was secured by the bills of lading or property taken, the deeds of real estate, etc.

Plaintiff's counsel then asked the witness :

"When was the Maltby Cedar Company organized?"

This was objected to as incompetent, not being the best evidence, but the court overruled the objection, and the defendants excepted. The witness answered: "In July, 1904."

Plaintiff's counsel asked the witness, Lewis:

"Q. Were there ever any cases, where your stock of personal property, poles or ties, became so broken that there were not enough to sell advantageously?"

This was objected to as leading. Objection overruled, and the defendants excepted.

Question continued:

"What did you do in cases of that kind so long as the business was active?"

The witness answered:

"Tried to replenish them, so as to sell the old. During that time, there was some new business."

Plaintiff's counsel then asked said witness on his direct examination:

"Q. How fast did you push the sales of the Maltby Lumber Company?"

This was objected to as leading, which objection was overruled, and an exception taken. The witness answered:

"We pushed it as fast as we could to close out the business in the proper way. There are some matters yet that are not closed up."

The Court erred in admitting the line of testimony shown by the following:

"Q. State to what extent, if any, your experience in this business enabled you to judge the value of the property? Answer it if you can?"

This was objected to as incompetent. The Court overruling the objection, and the witness answered:

"I think I was competent. I do not think I could have sold the assets to any better advantage by selling them more rapidly."

The Court erred in permitting the witness, Lewis, to answer the:

"Q. What can you say as to whether the amount realized from the assets represented their full value to the bank, in your opinion, that is what you got out of them?"

The Court, (Rec. p. 53) had stated:

"No bank can get what it is worth."

This was objected to as incompetent; defendants excepted, and the witness answered:

"They represented their full value to the bank."

The Court erred in requiring the witness, Lewis, to answer the

"Q. If on October 31st, 1902, Mr. Maltby had poles and ties in his various yards, what was the condition of the market if you know, as to whether those could or could not be sold? Whether they were quick assets or otherwise, if they were there?"

112. Defendants' witness, John M. Carswell, not Lewis as stated in the assignment of errors, whose testimony was read from the printed record of the previous case, page 450 to 452, inclusive, was asked on cross examination, the—

"Q. Take the River Rouge yard, was your attention called to any poles there that had been shipped to the telegraph companies in care of the Maltby Lumber Co., at the River Rouge or in Pinconning?"

This was objected to as immaterial because it had been shown that security was given to the bank, with a net

balance in favor of Maltby for \$185,000.00. It was the duty of plaintiff to show that the inventory was not correct, and the bank's manner of handling the property did not concern defendants.

The Court overruled the objection, and defendants excepted.

The witness was then asked, on further cross examination—

“Q. Take those mills that you spoke of, you don't know that the Maltby Lumber Co. owns those mills, do you?”

This was objected to by defendants' counsel as incompetent; the objection was overruled, and the defendants excepted, and the witness answered—

“I don't know who owns a mill any more than I was told, etc.”

This was objected to as immaterial. Objection overruled, and the witness answered:

“I can not recall that there had been any particular difficulty in selling any more than that possibly, I thought when we made the sales. I understand that the directors of the bank had the land appraised.”

Which answer defendants' counsel moved to strike out, which motion was denied.

Plaintiff offered in evidence the stock account of the defendant, Joseph W. McGraw, on the stock ledger—which was objected to as incompetent and immaterial. This objection was overruled, and defendants excepted.

The account shows that Joseph W. McGraw sold to Mary L. Hotchkiss on October 30th, 1903, twenty-five shares of stock at par, \$2,500.00, and that he had left twenty-five shares after making the sale.

Plaintiff's counsel then offered in evidence the account of Elizabeth W. McGraw, the wife of defendant, McGraw.

This was objected to for the same reason, same ruling, and same exception.

The entry showed the sale on April 15th, 1903, of three shares of stock, leaving three shares still owned by Elizabeth W. McGraw; the same account showed the sale of thirty shares of stock of Frank T. Woodworth on September 17th, 1903, being the stock of Mrs. McGraw Curtis.

This account showed that on May 6th, 1902, fifty-seven shares of Frank P. Chesbrough stock was sold to various persons, leaving ten shares still owned by Frank P. Chesbrough.

Twenty-first Assignment. (121st). (Rec. p. 381.) The Court charged the jury "it was claimed that all of these violations of the statute in the payment of dividends, was a part of a general design on the part of the defendants to deceive the public, etc."

There is absolutely no proof in the record of any general design on the part of the defendants to do any such thing, while there is affirmative proof that they, in common with all the other directors, acted together in what they thought was the best interests of the bank.

This is the unquestioned proof with reference to the two defendants, and proof of a similar kind on the part of the other directors was excluded by the Court.

122nd Assignment. The Court also charged the jury:

"In addition to the tenth count of the plaintiff's declaration, which is referred to, there are the first, second, fourth and fifth counts, which rely respectively on the reports of February 6, April 9, September 9, and November 17th, 1903, and treat each pur-

chase of stock by the plaintiff as a separate cause of action resulting from the publication of the preceding report. These counts therefore, enable you to consider each report and each purchase by itself, if you think they should be so considered. Plaintiff does not claim, and is not required to prove, that the defendants actually signed their names on the copies of the report which were sent to the printer, or that defendant, Chesbrough, signed all of the reports, or that his name was printed on all of them" (Rec. p. 380).

These were the matters complained of in plaintiff's declaration; not failure to charge off paper.

123. The Court erred in charging the jury as follows:

"The underlying fault if any such was committed in this case was in the failure of the board of directors of the bank to write off such part or portion of the loans and discounts as they then knew to be bad, if any" (Rec. pp. 380-1).

Twenty-second Assignment. The Court erred in refusing to permit the defendant Chesbrough's counsel to cross examine the plaintiff, Frank T. Woodworth, under the statute of Michigan, allowing a party to call the opposite party to cross examine him without making him his own witness.

"By Mr. T. A. E. Weadock: Q. In 1903, were you mayor of Bay City?" (Rec. p. 154).

Mr. John C. Weadock: I want to make an objection, as it is incompetent and improper at this time. It certainly was not overlooked.

The Court: Why did you not cross examine him at that time?

T. A. E. Weadock: It is more convenient to do it now. Does your Honor hold that I cannot cross examine him?

The Court: There is nothing to bring it up.

Mr. John C. Weadock: I object to counsel's cross examining the witness. I told him that if he had omitted any cross examination by inadvertence, I would permit it.

Mr. T. A. E. Weadock: It was not omitted by any inadvertence.

The Court: If you make him your witness, I will permit you to ask that question.

Mr. T. A. E. Weadock: I will not make him our witness. I desire to cross examine him under the State Statute.

The Court: Under the objection of counsel, you may cross examine this witness at this time relative to any matters that you overlooked or forgot when he was on the stand, but not relative to any matters intentionally omitted and not gone into by the plaintiff in their examination when he was on the stand before. As to those matters, you may only examine him by making him your witness. That statute to which you referred does not apply to this court in this case. The objection is sustained." (Rec. p. 155).

Public Acts 1909, No. 307, page 753, Howell's Michigan Statutes, Annotated, Section 12865.

"Hereafter in any suit or proceeding in any court of law or equity in this State, either party, if he shall call as a witness in his behalf the opposite party, employe or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding

grew, was an employe or agent of the opposite party, shall have the right to cross examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling or examining such witness shall not be bound to accept such answers as true" (Rec. p. 435).

Folowing that, the plaintiff being recalled (Rec. p. 419), defendant Chesbrough's counsel said, "I desire to ask Mr. Woodworth one question on cross examination under the state statute. I assume your Honor's ruling will be the same as before."

The witness was recalled and the matter was again called to the attention of the Court, when counsel for defendant Chesbrough said :

"I move that defense be allowed to examine the plaintiff Woodworth, as a cross examination under the state statute, and without making him our witness."

The motion was denied, and defendants excepted.

Mr. Clark, plaintiff's counsel: This is a new statute. I think he is their own witness on this subject (Rec. p. 419).

Mr. T. A. E. Weadock: No, I called him first on that before. I presume your Honor will make the same ruling.

The Court: Yes.

Defendants excepted.

Defendants contended that plaintiff's anxiety to purchase this bank stock was caused by the scheme to which he was a party, to acquire a controlling interest in the bank.

Charles A. Eddy, W. L. Clements, A. E. Bousfield and E. T. Carrington, all directors of the First National Bank of Bay City, were purchasing the Second National stock. Chas. A. Eddy was president of the First National in 1903.

The trial court refused to allow defendant to prove Woodworth's connection with this plan.

This is the main reason defendant wanted to cross examine him under the Michigan Statute of 1909.

Mr. Humphrey: I will show to the Court that this was a move to get hold of the stock to oust somebody out of the bank.

The Court: Sustained, unless you show that Mr. Woodworth was interested in this concerted action.

Mr. T. A. E. Weadock: We propose to show the concert of Mr. Woodworth with these same parties.

The Court: Sustained as not proper cross examination. Not proper to the direct examination, to which the defendants excepted.

24th Assignment. Plaintiff's counsel offered in evidence the account of Aaron Chesbrough on the same stock ledger, Exhibit 155, which was objected to as incompetent and immaterial, for the reason that no connection was shown between the two,—which motion was overruled, and the defendants excepted.

Woodworth sold to Andrews $2\frac{1}{2}$ shares at \$150, he sold the remainder of his stock in October, 1911, at \$105, making it worth at least \$52.50 per share.

The account showed that Aaron Chesbrough in May 1903 owned sixty-three shares of stock, of which twenty-five shares were sold on May 25th to Frank T. Woodworth.

Plaintiff's witness, Clift, was asked on his re-direct examination (Rec. p. 158) :

"Q. Take the Godkin stock that was sold. State whether or not you had the certificates for that stock or the certificates?

A. I did."

Plaintiff's witness, Clift, had previously testified that he did not have in his possession the McGraw or Chesbrough certificates.

To the above question, defendants' counsel objected that it was immaterial and irrelevant. The objection was overruled, and the attorney for defendant McGraw excepted.

It was agreed at the beginning of the trial (Rec. p. 26), that objections and exceptions for one defendant would be for the benefit of both.

53rd and 54th. (Rec. p. 154). It was shown by the testimony of the witness Clift (Rec. p. 154), that there was a movement in the First National Bank to get hold of the stock of the Old Second National Bank for the purpose of consolidating the two banks, and the stock had been sold by Clift to Charles A. Eddy, W. L. Clements, and A. E. Bousfield, all of whom were then directors of the First National Bank.

The witness after giving this testimony was asked :

"Q. Which of these men told you that they wanted to get hold of that stock of the Old Second National Bank?" (Rec. p. 155.)

HONESTY OF EMPLOYEES.

Twenty-fifth Assignment. Mr. E. B. Foss, one of the directors during the entire time in question, when on the stand, was asked by defendants' counsel whether the employes of the bank during the years 1902 and 1903 were honest and competent.

This was objected to by plaintiff's counsel as immaterial, and they stated that they did not attack them in any way.

"The Court: The objection is overruled if you want to spend any time on it. The objection was renewed and the testimony excluded the Court saying, 'the matter has been gone over time and time again.'" (R. p. 411, top).

55th. The Court erred in sustaining plaintiff's objection to the question of defendants' counsel, with reference to E. B. Foss, which was asked of plaintiff's witness, W. O. Clift:

"Q. Do you know E. B. Foss?

A. I do.

Q. And he is a thoroughly honorable and competent business man in this community?"

Objected to as incompetent, irrelevant and immaterial, as he will be a witness in this case. Which objection was sustained and defendants excepted.

I submit this question was competent, because it was proper for the defendant to show the manner of men the directors were; to negative plaintiff's claim that his sole reliance was on the report.

Mr. E. B. Foss, when on the stand, was asked by defendants' counsel whether the employes of the bank in the years 1902 and 1903 were honest and competent.

This was objected to by plaintiff's counsel as immaterial, and they stated that they did not attack them in any way, and the court excluded the testimony.

The fact that they were not attacked did not affect the defendants' right to offer affirmative proof of the competency and honesty of the bookkeepers and other employes in the bank, in order to show why they attested the reports.

Twenty-sixth Assignment. The trial Court admitted in evidence for plaintiff, over defendants' objection for incompetency, Articles 4, 5, 11 and 14 of the by-laws of the bank. (Rec. pp. 55, 56.)

There was no evidence offered at any time that plaintiff had ever seen or known anything of these by-laws, and the law fixes the measure of directors' duties and liabilities. In relation to the statement described in Section 14 there was no evidence offered that defendant ever saw it.

The 56th Assignment related to a question to the witness Clift, in reference to the manner in which he sold other stock in this bank.

"Q. Take the Godkin stock that was sold, state whether or not you had the certificates for that stock?"

This was objected to as immaterial, irrelevant and incompetent in this case, which objection was overruled, and the witness answered, "I did."

It would make no difference whether the broker had the manual possession of the stock he sold, or whether it was in the hands of the bank, as some of the stock was.

In either event, the transfer would have to be made at the bank.

The evident purpose, and effect of this was to convey the impression to the jury that there was something wrong about the manner in which defendants' stock was sold, and something different from the manner in which other stock was sold, but the difference proved was entirely immaterial, as it was proper and legitimate in either way.

It was urged that defendants were sued because they "deserted the ship," that is, sold their stock in the bank, but both defendants retained stock in the bank, Chesbrough only \$1,000 at Bump's request, and he was about to move away. McGraw kept \$2,500, half his stock, till after plaintiff had succeeded in defeating him for director. A. J. Cooke sold his stock and Bump, the president, sold all his, and plaintiff bought. Why select defendants only?

Upon the cross examination of plaintiff's witness, Ames, page 410, defendants sought to show sales of stock by others. It was objected to as not proper cross examination, and the objection was sustained, under the old rule referred to elsewhere.

Defendants sought to show that Mr. Ames sold A. J. Cooke's stock January 17th, 1902; that on December 16th, 1903, he sold the stock of Orrin Bump to plaintiff. This testimony was excluded.

Twenty-seventh Assignment. This covers the rulings as to Stock Sales by defendant Chesbrough and others.

52nd, 56th, 57th and 58th. Each of these assignments in the Court of Appeals relates to the rulings of the court with reference to the admission or rejection of evidence regarding the sales of bank stock by the defendants.

Twenty-eighth Assignment. This relates to rulings on the Maltby inventory of October 31st, 1902. Exhibit 247, also Exhibit V.

This inventory was before Maltby at Jackson, Miss., when he was examined as a witness, for the second trial on Nov. 11th, 1912, a full month before the trial. No evidence was offered to show that it was incorrect, "padded," "fraudulent" or suspicious.

The exact descriptions of the land, both with timber and without, the location and description of the property were all known to plaintiff and had been known to him since the first trial in 1909, when the same land book was in evidence. One of the contracts which Maltby had with the Pere Marquette Railway Co., for half a million ties, if carried out, as the bank might have had it completed, would have brought a profit of forty thousand to fifty thousand dollars (Rec. p. 341).

The witness, Andrews, was asked, whether the bank suffered a loss through the Maltby paper in the Mosher failure in 1895. Which was objected to as immaterial, which objection was overruled, and the witness answered—

"There was a loss on the claim. I don't remember what year it was."

The witness, Lewis, was asked, whether he had any difficulty in disposing of cedar swamp lands without any timber. Which was objected to by defendant's counsel as immaterial, and overruled, and the witness answered—

"He didn't recall any particular difficulty," etc.

Defendant's counsel moved to strike out the answer, and this was denied.

It will be remembered that Lewis had nothing to do with selling the lands or handling the business. He was in the Maltby office in Bay City.

The witness, Andrews, was asked, whether any loss to the bank was made by reason of the fact that the drafts of the Maltby Lumber Company for material sold by that company to the various purchasers had not been accepted, or any loss had been made on account of the assignments of accounts for these products by the Maltby Company to the bank. Which was objected to by plaintiff's counsel as reaching and argumentative, which objection the Court sustained, and defendant excepted. (Rec. p. 229).

Though defendant Chesbrough never saw the McGraw report that report did disprove the Maltby inventory in which the personal property covers thirteen pages (Rec. pp. 304-17). McGraw report five and a half pages (Rec. pp. 218-223).

Shipping of material had been going for months before (Rec. p. 223) and Maltby was in charge for the bank under a salary (Rec. p. 320), and trying to convert the material into money. Personal property at nine places inventoried at \$39,677.50 was "not examined" by McGraw (Rec. p. 248). Also property at Crooked Lake was not examined (Rec. p. 219), nor valued.

McGraw says, "Received information from foreman that 10,000 pieces of posts and round cedar and poles." These were not valued—nor "300 pieces of logs in the woods." (Rec. p. 220.) "4000 cords of shingle bolts" not valued at all (Rec. p. 221); nor "40,000 pieces scattered in the woods" (Rec. p. 221).

Maltby had built up a large business and in the way business was done the bank was getting pay from the purchasers, and whether the business was done in a corporate or trade name, with or without a commercial rating made no difference.

Maltby had paid the bank \$25,000 in cash and turned out a lot of timber lands to the bank to settle his indirect liability to this bank growing out of the Mosher failure. He had been discharged in bankruptcy and since that time had built up a large and successful business. Although prices went down after Oct. 1902 (Rec. p. 319), he was paying the \$25,000 to \$30,000 a year in interest.

In addition to places named as omitted by Mc-

Graw he made no report on Au Gres prop- erty (Maltby Inv.) (Rec. p. 316)	\$ 3,476.48
Accounts receivable	73,115.18
Personal accounts	78,356.59
Camps	5,782.03
Horses, harness, sleighs, etc., horse, camp, etc., G. R. & I. Job	10,015.25

Pinconning, etc., in other places, in all.....\$170,715.53

And this property was not even mentioned, nor its non-existence noted, if that was the fact, in the McGraw report.

Maltby was curtailed by the directors of the bank (not Chesbrough, who was in Chicago), and the property which would have paid the bank and left Maltby a surplus. (Rec. pp. 320, 321.)

A piece of real estate that is listed in the inventory at \$2,050.00, was held on a tax title bought by Mr. Maltby's clerk for \$291.40; all of which is perfectly plain and reasonable, and no mistake is pointed out in it. Under the title, the purchaser had the land, and all it was worth, and there was no proof to the contrary. He had the title of the State, and the land and timber might have been worth ten thousand dollars, but there was not a word of testimony that it was not worth what Maltby claimed.

Personal accounts referred to on page eleven were where advances had been made to parties who were getting out timber and material, and was to that extent a purchase of property.

The railroad and other responsible purchasers of the Maltby products would not accept drafts. They had their own systems of inspection, auditing and payment, but the title to the property was transferred to the bank by transferring the bills of lading, besides that the accounts for the property were assigned to the bank and the railway companies had agreed in writing. (Exs. 171 to 220 et al. Rec. p. 171 et seq.)

The statement of the case in the brief submitted for defendant and cross plaintiff in error is excepted to, as a statement of extracts from that portion of the evidence which is thought to help Woodworth, and consists principally of argument. The allegations about "fraudulent drafts," "inflation," etc., are all mere rhetoric with no evidence upon which to base them, and directly contradicted by Maltby's testimony, the only man who really knew anything about the matter in the inventory, that was sworn in the case.

There is no evidence that the "board appreciated the fraudulent character of the inventory," and it did not "immediately" take charge of Maltby's business; that was not done until January, 1903, when Lewis was put in charge of his office, but Maltby was left in charge of the business at a salary from the bank, for a year afterwards.

The reference on page eight of Woodworth's brief is not supported by the citations to Record page 330, where Maltby says, he was questioned about his affairs, which questioning was proper enough.

The difference between the amounts due from the different companies and the amounts claimed to be due by Maltby might be explained by the fact that the property had not been inspected, and credited up by the consignees.

The evidence in reference to the amount due referred to at (Rec. p. 248), was letters from the different parties in answer to Andrews' letter of inquiry as to the status of the Maltby account, and Chesbrough knew nothing about it. He never saw them and they were not brought to his attention.

Judge Collins testified that he had no accurate information concerning the lands or tax titles. He examined some abstracts, but remembered no details. He took all the securities Maltby had to offer, and transacted all the business with Maltby. (Rec. p. 248.)

The public was not concerned in reference to the Maltby deeds to Davidson, being security to the bank. (Andrews, Rec. p. 109.)

Judge Collins said it would be a better business proposition to have the deeds in the name of James Davidson.

Counsel for Woodworth in the endeavor to put a wrong meaning on this transaction, asked:

"Q. And a better reason is that you did not want the public to know that that security was taken from Maltby by the bank? Isn't that true?"

This was objected to as incompetent and immaterial. The objection overruled, and an exception taken, and the witness answered:

"I would not want to put it as strong as that."

"Q. Put it as strong as you think the facts will bear?"

"A. I can tell you that I did know as a matter of fact and belief that the public would know just the same." (Rec. p. 247.)

so nobody was deceived.

There was no competent evidence given in the case that Maltby had no title to the land or any particular piece of it. Lewis, who knew nothing about it, said some of the tax titles were defective (Rec. p. 125), but no description was pointed out to which the statement applied, and it was mere hearsay. The lands were sold; the Maltby Cedar Company giving quit-claim deeds, and is evident from the testimony of Lewis (Rec. p. 126), that no proper or business-like disposition of the land was made. (Rec. pp. 126-127.)

Lewis (Rec. p. 119), gave no reports to Chesbrough either verbal or written. He made his reports to the officers of the bank; that, of course, meant the executive officers. He says he talked with McGraw and Chesbrough, but he refers to "the company." The company referred to was the Maltby Cedar Company, which was not organized until 1904.

Carswell, referred to on page twelve of defendant's brief, was not an expert, and knew nothing about lands, telephone poles, cedar ties, or other property that Maltby had been dealing in, neither did he know anything about the titles. Even he said that he did not know how much land there was that he placed a valuation on. (Rec. p. 366.)

It should be remembered that the prices of material set forth in the inventory were based on the contracts which Maltby had with the Telephone, Telegraph and Railroad Companies, with which he was dealing, and which he would have received if he had been permitted or aided to carry out the contracts.

The fact that the business was not as well managed afterwards as it was before would account for a large difference in receipts for the property. (Rec. p. 332.)

If some of the Maltby timber had been purchased on a time limit, it was the duty of the bank to have cut and removed the timber within the time, and as they controlled the business, that was their fault, and not the fault of defendant Chesbrough.

It was objected to the inventory that the property was widely scattered, which is answered by the obvious statement that to get cedar poles, you had to go where they grew, and the property could not be better situated for handling than at "different points along various branch railroads."

None of the men connected with the officers or directors of the bank had any experience in this sort of business.

The statement charges that the directors knew the bank's claim would not bring more than 50%, and yet, they were not permitted to testify on the trial, either as to their knowledge or belief in the value of the securities or the paper.

There was an interval of about five weeks between the date of the inventory, October 31st, 1902, and the McGraw report, during which shipping was going on. Whatever was shipped belonged to the bank by the assignment of accounts, the bills of lading, and the letters of responsible consignees that they knew the arrangement and would carry it out.

The McGraw report on its face showed the omissions as hereinbefore stated.

Plaintiff signed the reports to the comptroller of January 11th and May 29th, 1905, in which all the Maltby

paper was listed at its face value, and at that time, he must have believed, with the other directors, that the paper was good.

True, after the experience of being sworn in three trials in his own behalf, he undertakes to explain that they could not have charged off any more at that time without closing the bank, but this testimony and these reports show that he was never deceived for a moment by the report, and as he testified, in the first trial at Saginaw, he knew that "loans and discounts" included all the paper the bank had, "good, bad and indifferent." (Rec. pp. 43, 44, 46). He also testified that he knew that the reports in 1903 were made up in no different manner than the ones he signed in 1905.

What plaintiff did in 1905 showed what he understood in 1903 in reference to bank reports; namely, that loans and discounts included all the paper the bank had, good or bad, that had not been charged off.

STATEMENT OF POINTS.

I.

The trial court had no jurisdiction because all parties resided in the eastern district of Michigan, and there was no question that the Federal statute governed the case. *Hermann vs. Edwards*, 238 U. S. 107.

II.

Defendant Chesbrough's demurrer should have been sustained because the declaration did not charge the board of directors with violating any of their duties, and two or seven directors could not have charged off any bad paper. They did not try because they believed the paper good at the time in question, and no special knowledge was charged against or known to defendants.

III.

Defendant Chesbrough could not be liable for the action or non-action of the board, in which he did not participate during his absence from Bay City.

Briggs vs. Spaulding, 141 U. S. 132.

IV.

Letters from the Cashier Andrews to various creditors of and persons dealing with the Maltby Lumber Company, replies thereto were not admissible in evidence and could not bind Chesbrough, for he had not seen them nor were they brought to his attention prior to Nov. 17, 1903.

V.

The custom of other banks and bankers in Bay City where the bank in question was located, in reference to making and publishing reports should have been admitted in evidence.

VI.

No evidence of payment of dividends from 1895 to 1903, nor after that date was admissible, and the consideration of the subject of dividends should have been withdrawn from the jury, those in 1902 and 3 not having been voted for by defendant, and those paid being paid in good faith on advice of counsel.

Witters vs. Sowles, 31 Fed. 621; S. C. 43 Fed. 406.

VII.

Reports to the Comptroller were correct, according to the books of the bank and correctly stated the loans and discounts.

- a. Plaintiff did not rely on the reports, he was acting with a pool which wanted to get control of the bank.
- b. He had been employed in this bank and knew how the reports were made out.
- c. He knew, as he testified that loans and discounts included all the paper the bank had, "good, bad and indifferent." (Rec. p. 43).
- d. He signed reports of Jan. 11 and May 29, 1905 when a director and he knew at that time the loans and discounts contained a large amount of paper that would be a loss. (Rec. p. 38) but he signed "be-

cause Andrews asked him to," he "was reckless, careless," and understood that "reports in 1903 were made out the same way as in 1905."

VIII.

No director believed the Maltby paper was bad prior to Nov. 17, 1903. Both defendants believed it was good in the belief of the other three directors who were called as witnesses for defendant was excluded.

IX.

Charging off paper.

Neither defendant Chesbrough nor both defendants could charge off paper, and made no effort to do so, before prior to Nov. 17, 1903, they believed the paper good.

X.

Directors are not bound by what appears in the reports and papers of the bank.

Defendant Chesbrough is in no way bound by the Graw report, Exhibit 223 (Rec. p. 218) for he never saw it or knew what it contained until the second trial in this case.

The report itself was incomplete and defective and otherwise unreliable.

XI.

The Maltby inventory of Oct. 31, 1902, was not disputed by any competent testimony in the case.

Lewis was incompetent for the management of the Maltby timber business and the securities did not bring their value

ne, nor were the Maltby contracts carried out, thereby incurring large losses after the year 1903.

XII.

Defendant Chesbrough had the right to prove, and rely upon the honesty, integrity and ability of Pres. Bump, Cashier Andrews, and the other officers and employes of the bank.

XIII.

Cross-examination of plaintiff under the Michigan statute of 1909, and the conformity acts was denied to defendant, thus preventing the proof of plaintiff's connection with the First National Bank pool to acquire the stock of the Old Second National.

XIV.

Evidence of what happened to the paper or securities after Nov. 17, 1903, the date of the last report complained of was incompetent, and practically all the testimony, aside from the books, letters and papers of the bank, was admitted as "history of the transaction" was after that date. Giving it a name would not make it admissible.

XV.

Refusal to direct verdict for defendant. (Rec. 155, 373.)

The Record contains all the evidence in the case. (Rec. p. 390.)

The motion was based on defendants' claims:

1. That this case could not be maintained against two of seven directors.
2. Omitted here.

3. The bank being solvent at all times the liability, if any, was an asset of the bank.

4. No knowledge rendering defendant liable under Sec. 5239 R. S. was proven.

5 and 6 omitted here.

7. Defendant Chesbrough had nothing to do with publication of the reports.

8. Plaintiff could not recover under his declaration.

9 and 26. No conspiracy on part of defendant was proved, as charged.

10. Only affirmative action of defendant, attesting reports, etc., no non-action—nothing done fraudulently, or maliciously and reports being first sworn to by an honest cashier on whom they had a right to rely.

11. Omitted.

12, 13, 15, 16, 17, 18, 20 and 21 related to the different counts of the declaration and the specific objections are argued in connection with the demurrer.

19. Only a majority could declare a dividend and if illegally paid could be recovered only by the bank.

22. The examination of the bank by examiners and the action of the comptroller who decides on the reports, was in favor of the bank.

23. Defendant Chesbrough could not charge off any paper, and should not try to charge off good paper that he and the directors believed good.

24. Covered by 9th.

27. Defendant Chesbrough's absence from Oct. 17, 1902 to Mar. 27, 1903 and from many directors' meetings after that. (Rec. p. 156).

The plaintiff had failed to prove a case and there was a variance between pleadings and proofs.

XVI.

Defendant Chesbrough's sale of portion of his stock was within his right.

Defendant McGraw was also justified in selling portion of his stock.

XVII.

Errors in charge to the jury.

XVIII.

Both the Court of Appeals and the Trial Court erred in the Measure of Damages plaintiff might recover.

ARGUMENT.

Points I, II, III—Jurisdiction.

1. Jurisdiction.

The plaintiff brought this action under Section 5239 R. S. in the Circuit Court of the United States for the Eastern district of Michigan, in which all the parties, both plaintiff and defendants resided.

There was no controversy between the parties that the rule of liability governing the case was that prescribed by the statutes of the United States and the Supreme Court of Michigan in one of this group of cases, had so held, *Smalley vs. McGraw*, 148 Mich. on pp. 395-6. That however did not prevent the State Court from having jurisdiction, and the cases of *Taylor vs. Thomas*, 224 U. S. 73, and the

Jones National Bank cases were tried in the state courts and came to this court on writs of error to the New York Court of Appeals, and to the Supreme Court of Nebraska, just as this case might have come here from the Supreme Court of Michigan, if the case had been tried in the State Court, or from the United States Circuit, (later District) Court where it was tried.

Barnes vs. Swift, 3 Ohio N. P., National Bank, Dec. 29, was a case of a state court against directors of a National Bank for deceit in making a false report.

The question was covered by the first point of defendant's demurrer, viz: that "plaintiff's declaration as a whole sets out no cause of action against this defendant upon which plaintiff can recover." (Rec. p. 20.) The declaration was filed Mar. 31, 1908.

Where the directors of a national bank have violated the provisions of the national banking act, to the damage of the bank and its shareholders, and the bank fails upon request to bring an action against such directors for the recovery of such damages, an action may be maintained for that purpose by a shareholder, but such action must be brought by such shareholder on behalf of himself and all the other shareholders, the bank must be made a party, the judgment must be in its favor, and the proceeds of such judgment will inure to the common benefit of all the shareholders alike. Such action may be brought in a State Court. (*Zinn vs. Barter, et al.*, 4 Banking Cases, 74; 62 N. E. Rep., 327; 65 Ohio St. 341.)

In such case, a shareholder can not maintain such action for his benefit alone while the bank is a going concern and has not been dissolved by proper action

by the Comptroller of the Currency in a Federal Court. (1b.)

Therefore, it is respectfully submitted that under the case of *Hermann vs. Edwards*, 238 U. S. 107, the case should be remanded to the United States District Court for the northern division of the Eastern District of Michigan with the instructions to dismiss the action.

At the time the case was begun it was the opinion of defendant's counsel that this question, being one arising under the laws of the United States, was ruled by *Wyman vs. Wallace*, 201 U. S. 201, last paragraph on page 241.

However that case was cited in support of jurisdiction in *Herman vs. Edwards*.

Since the Edwards case was decided this Court has again considered the question in *Jones National Bank vs. Yates*, 36 Supreme Court Reported 429. The attention of this Court is respectfully asked to the differences between that case and this.

The Capital bank never had any real capital, and was insolvent from the start.

The Old Second National Bank was always solvent.

The Capital Bank failed, owing a million dollars more than its assets.

The Old Second National was always a going concern.

The four actions against the directors of the Capital Bank were brought by depositors, three country banks and one Bailey, all residing in small villages in Nebraska, not in the same city or county as this bank. Bailey made his last deposit the day the bank failed.

Plaintiff in this case had been employed for years in the Second National, Old Second National on re-incorporation, knew every one connected with the bank for years, always kept his account there, and with others was trying to get control of the bank.

The president and cashier of the Capital Bank owed it more than half its capital stock; President, \$85000; Cashier, \$54000.

The officers and directors of the Old Second National did not owe the bank a dollar. It owed them for they kept their accounts there. (Rec. pp. 235, 173.)

All the seven directors of the Capital Bank were sued.

Only two directors were sued in this case although the others were wealthy and as the matter now stands there is but one defendant, Chesbrough.

The letter of the Comptroller dated Feb. 16, 1892, pointing out the condition of the bank, was answered and signed by the seven directors of the Capital Bank.

There is no evidence in this case that Mr. Chesbrough ever had any knowledge of the Comptroller's letter of Oct. 21, 1902.

In the Capital Bank there was "manipulation of accounts," "fictitious and falsified entries," "fraudulent concealments" and "scandalous maladministration."

In this case the books were correct, and the officers, directors and employes were honest and efficient men.

There arises in this case one of the same questions presented by that case, viz: Whether there was substantial evidence to support the verdict.

If the court sustains the jurisdiction of the U. S. District Court, and reviews the questions, the 1st and 2nd assignments of error go to the whole case in a general way.

Plaintiff seeks to recover damages claimed by him through purchasing from a broker stock of the Old Second National Bank of Bay City, Michigan, at various times between March 16th and December 16th, 1903.

About 1878 plaintiff was messenger and later deposit bookkeeper in this bank for some years. (Rec. p. 35.) He was well acquainted with every one connected with the bank, and had been for many years. He knew Alvin Maltby, knew his entire business history, and that he was dealing with this bank, and that it had made a loss by him in the Mosher failure, as it had sustained losses through others, as he well knew. He, also, knew of the reduction in the capital stock. He knew how the published reports were made up, and that they were prepared by the officers in the bank, and that the officers and employees were honest and competent.

Each of the reports complained of were sworn to by Mr. Andrews, the cashier, before they were attested or published and Woodworth testified that, "I think that Martin M. Andrews is an honest, capable, and honorable man, and have always believed him so." The court charged the jury: (Rec. p. 386) "You are not concerned in this case with what Mr. Andrews knew or believed."

Plaintiff "didn't think the reports of 1903 were made up any different way from the one(s) I signed in 1905."

(Rec. p. 40 middle of page. Exhibit 169. Report of May 29, 1905.)

(Rec. p. 161. Exhibit 170, Rec. p. 165. Report of Jan. 11, 1905.)

After leaving the bank he went into the lumber and logging business, and he kept his account in this bank for all the years of his business career, and it made losses by him as a member of the firm of Smalleys and Woodworth.

He did not buy any stock of defendant Chesbrough and no representation or statement either oral or written was made to him by defendant Chesbrough or defendant McGraw, nor did any stockholder of the bank ask him to make any purchases of stock in this bank. He is now claiming that his measure of damages is the difference between what he paid for the stock, and, theoretically, what it was really worth at the time he purchased, but really claiming the difference between what he paid, and the value of stock after a loss of \$155,000.00 was ascertained and charged off about two years later, in 1905.

His action is based on defendants "signing and attesting" certain reports to the comptroller of the currency, as published in the newspaper, which he claims were "knowingly false" in that the "loans and discounts" were worth less than their face value.

The first report which Chesbrough attested or knew anything about was that of April 9th, 1903 (Rec. pp. 5-6).

He was living at the Metropole Hotel in Chicago, from about October 17th, 1902 till March 27th, 1903.

On March 14th plaintiff first purchased stock, 20 shares, purchasing some telephone stock at the same time. (Rec. p. 31.)

The report of April 9th could not have had anything to do with that purchase.

The case of *Gibbons vs. Anderson, et. al.*, 80 Federal Reporter, 345, cited for plaintiff below, was brought by the receiver of the City National Bank to establish the liability

of the defendants Foster and Anderson, who were directors of the bank, by a bill in equity, for negligence in the performance of their duties.

Hon. Arthur C. Denison, who wrote each of the opinions of the Court of Appeals in this litigation, was the counsel for the complainant in that case, and therefore the case requires more than passing notice.

The opinion in the Anderson case was rendered by Judge Severens, and the case was never heard on appeal, having been compromised.

Judge Severens professes to be guided by the case of *Briggs vs. Spaulding*, 141 U. S. 132.

There is one significant paragraph in this opinion, found on page 351 :

"If defendants had been able to show that they themselves had done what they could to induce the board to attend to its duty, a different case would be presented."

This idea was the basis on which both opinions of the Court of Appeals seem to be found; that is that McGraw and Chesbrough should have done something about charging off the Maltby paper. In Judge Denison's first opinion in this case he said: (195 Fed. Rep. 880 in par. 6) : "* * * When the foundation of the suit is the nonaction of the board, and such wrongful nonaction appears * * * it must be made to appear that the director participated in, or assented to the wrongful inactivity by failing to make reasonable personal efforts to induce the proper action."

The defendants up to Dec. 1, 1903, which period covers the case, believed the paper good, the other directors were not allowed to give evidence that they believed it good. No

one thought it his duty to have the paper charged off, thus no "wrongful nonaction" was proved.

Plaintiff only proved that President Bump discounted certain drafts based on assigned accounts and bills of lading, that about two years later, and after the date of the last report, some of the amount so advanced was lost. As there was no wrongful nonaction proved, defendant could not "participate" in it, and the record shows that he had less knowledge of the Maltby line, than any other director.

When the Court of Appeals said that "directors who approved and participated in carrying on the books, among the loans and discounts, of a line which they know is worthless," etc., it certainly meant that the directors must know the line is worthless in order to subject them to criticism, and when that is one of the essential facts in the case, it is certainly error to refuse to permit the directors, and each of them to testify that they did not regard the paper as doubtful or worthless, and on the contrary, regarded it as good.

The amount of the drafts as the business was done might have been a million dollars, and the directors would have violated no law because such loans had been made.

The comptroller's letter of October 21st, 1902 (Rec. p. 70), only called attention to the amount of the Maltby drafts, and their character, and stated that in order to come within Section 5200, the bills of exchange should be drawn in good faith against actually existing values, and the only criticism made by the comptroller was that the amount exceeded the limit of that section, which limit this court has held immaterial in this case.

The case of the *Second National Bank vs. Burt*, 93 N. Y., 223, was a case brought against a former cashier of the

plaintiff to recover damages alleged to have been sustained on account of his negligence and violation of duty as cashier in discounting certain drafts, etc. These drafts were drawn against responsible firms for lumber shipped them; the firms finally became insolvent, and the bank incurred a loss of Twenty-Four Thousand Dollars.

Chief Justice Ruger delivering the unanimous opinion of the court, held—

“We think, therefore, that the drafts in question came within the meaning of that clause of the National Currency Act providing that bona fide bills of exchange drawn upon actual existing values should not be subject to the prohibition against banks lending money to a single person or firm in excess of one-tenth part of their capital.

We think it entirely immaterial whether such bills are accompanied by a specific bill of lading in each case, or are drawn against property previously consigned, and existing either in its original form or in the shape of proceeds of sales in the hands of the consignees. In either case the funds have already been provided by the drawer in the hands of the drawees to meet the requirements of the obligation.

The object of this provision of the Currency Act was to guard national banks from the hazard of loaning money in improvident amounts upon speculative and accommodation paper, but it contemplated and permitted to an unlimited amount the discount of paper used and required in facilitating the transfer of property and money in the transaction of the legitimate business of the country.

We are, therefore, of the opinion that the court below erred in holding the defendant liable for discounting the paper in question to the amount in ex-

cess of the tenth part of the capital stock of the plaintiff, and that such discount comes within the exception as being bona fide bills of exchange drawn upon existing values."

The Court of Appeals in its opinion, (Rec. p. 419), said, the conclusion which a director would form about the value of Maltby assets would depend upon several elements.

1. "The extent to which his personal confidence in Maltby was impaired."

2. "The extent of his knowledge about the assets, and from other sources than Maltby."

3. "His expert knowledge of this particular branch of lumber business, and his resulting skill in valuing the assets of a going business," and

4. "His individual tendency to look on the bright or dark side of the matter."

Perhaps it could be assumed that Chesbrough was in the same position as the other directors as to the second above recited element; there can be no such assumption as to the other three.

We think the trial court was right in confining the testimony of the other directors to their acts, and in refusing to permit them to declare their state of mind.

No evidence will be found in the record showing any particular personal confidence of Chesbrough in Maltby, or any close knowledge of Maltby or his business. Chesbrough's reliance was on Bump, and Bump's assurance that Maltby's large line, which all directors would naturally be anxious about, was safe.

No special knowledge of Chesbrough about the assets of the Maltby Company is shown by the record, and he had

no expert knowledge of that business. He had never been engaged in it nor dealt with it, nor with such products in any way; his business was logs and lumber and their sale and transportation, and not being interested in, or acquainted with the Maltby business, he could have no particular skill in valuing the assets of such business.

As to looking at the bright side, if Chesbrough thought the paper was good at the time the reports were published, so did every other director, as shown by his action, and therefore, defendant should have been permitted to show the reason of the action, and their state of mind, which would have disclosed why they took no action to charge off the paper.

Upon the second trial, before Judge Tuttle, the court treated the case as one against two of seven directors for not charging off paper which they could not possibly have done, which paper years after it was taken caused a loss to the bank, which loss could be established by the books of the bank and proof of the subsequent history of the paper after the date of the last report complained of, November 17th, 1903.

This testimony was admitted over defendant's objection, because it was claimed, under the opinion of the Court of Appeals, paragraph four, that:

"The detailed history of the entire transaction and of each defendant's connection is, speaking generally, admissible as tending to show whether the loans at the time in question were in fact bad, and whether each defendant knew that fact, but not as otherwise establishing any liability."

In construing this portion of the opinion, the trial court overlooked the court's statement which preceded and qualified it, viz:

"When the duty exists" means when the condition is such that a majority of the directors know that the paper should be charged off, and when they have that knowledge, each one who participated in that knowledge, and also participated in the neglect to act upon the knowledge, could be held to account.

This, however, could not apply to a director who did not have the knowledge, and moreover, was not present at the meetings of the board, for the reason that he was out of the state, and in Chicago, on account of illness in his family.

It is shown that he was not present at the meetings of the directors which were held on April 4, 11, 18 and 25, May 2, 16 and 31st, June 27, July 11, 18 or 25, August 1, 8, 15 or 29; September 12, 19 or 26; 10th, 24th or 31st of October, November 7, 28, or December 4, 12, 19 nor 26th, all in 1902. Neither was he present at the meetings held January 2, 9, 16, 23 and 30th. Nor at the meetings held on February 6, 13, 20 and 27; nor March 6, 13 nor 20, nor April 17, nor May 1, nor May 29, nor June 12, 26 nor July 3, 10, 17, 24, 31, August 8, 14, 21, 28, nor October 2, 9, 16 and 23, 1903.

Defendant Chesbrough was safely within the rule laid down by this Court in *Briggs vs. Spaulding*.

In that case Francis E. Coit was elected a director in May, '81. He was an invalid unable to transact business. He was re-elected in 1882. The bank failed April 14, '82. He sold his stock in the bank April 11, '82. All the directors were charged with negligence, etc.

Charles T. Coit signed a report Mar. 11, 1882, correct according to the books of the bank sworn to by the cashier, and signed by Francis E. Coit before he signed it.

Point II.

Third Assignment of Error, overruling defendant's demurrer (Rec. pp. 448, 27).

This is considered in the statement of the case, and the specification of errors. The demurrer was overruled before the first trial and the Court of Appeals affirmed that action.

Points IV and X.

Fourth Assignment. (Rec. p. 428.)

Letters written by the cashier, Andrews, and replies thereto between Oct. 31 and Nov. 4, 1902, (Rec. p. 174 et seq.) were admitted over objection, for not having been brought to the knowledge or notice of Chesbrough.

There was no competent proof that the board of directors neglected to charge off any paper, that should have been charged off, nor that the board knowingly assented to any such violation.

It was not sufficient to show that the books of the bank showed a large amount of Maltby paper.

The defendant, as a director, is not charged with the knowledge of what appears in the papers and books of the bank.

The separation of the discounts into old and new by Mr. Andrews was a matter of bookkeeping in the bank, with which defendant Chesbrough had nothing to do, for which he is not accountable, by which he is not bound.

Plaintiff's Ex. 66 to 83 inclusive (Rec. p. 83 et seq.). Exhibit 66 was a pencil memo. made by Andrews of which defendant Chesbrough knew nothing. (Rec. p. 83.)

The same is true of all memo. and statements of Home Drafts etc. Clark, the plaintiff's expert made in his three months' work such as 154 to 162 inclusive.

For example:

Exhibit 154 was a chart of the Maltby drafts drawn on the Michigan Central Railroad Company, with renewals, etc., making a strip of paper, several feet in length.

Exhibit 170 was the accountant's tabulation of the drafts, and was objected to as incompetent, irrelevant and immaterial for the reason that the counsel in his statement shows that the paper in itself is incomplete; that it shows simply the date, names and amounts of the different papers. (Rec. p. 88.) It has no reference to the bills of lading, nor the inspection certificates, nor the assignments of the accounts to the bank and is a partial, one sided, self serving statement, and in so far as the figures are repeated, are incompetent as being already in evidence with the other papers if they are correct.

Exhibit 162.

Chesbrough was asked at the trial if he could pick out certain papers from the red box.

There was no evidence that defendant Chesbrough knew what was in the red box in May, 1902, and it was not limited to that, but the papers "now in that red box,"—ten years afterwards.

Fifth and Sixth Assignments of Error. (Rec. p. 426.)

The fifth assignment was based on the Court of Appeals overruling the assignment in that court, which was based on the action of the trial court in admitting evidence of what was done at meetings of directors when defendant Chesbrough was absent in Chicago.

The sixth assignment was based on the admission of exhibits 25 to 47 inclusive, (Rec. p. 426), which were letters sent out by Andrews to various parties dealing with Maltby and the replies thereto, ascertaining the state of the accounts for forest products between Maltby and the other parties.

The ground of the objection was that none of these letters was ever known to, nor brought to the attention of defendant Chesbrough.

Point V.

Seventh Assignment of Error, (Rec. pp. 426, 366.)

The Trial Court excluded evidence of the custom of other banks in Bay City at the time in question relating to reports. (Rec. p. 412).

On the trial defendants offered testimony as to the custom of bank directors in different banks, both national and state, in Bay City in reference to the manner of making out reports to the comptroller or banking commissioner, and to show that these reports agreed with the books of the banks, no actual examination being made by the attesting directors. (Brown, et al, Rec. p. 366.)

In determining whether bank directors exercise ordinary care, which the law requires, regard must be had to the usages of the particular business, and if directors perform their duties as such in the same manner as they were performed by all other directors of all other banks in the same city it could not fairly be said that they were guilty of gross negligence.

Swentzel vs. Penn. Bank, 147 Pa. 140, S. C., 15

L. R. A. 305; 30 Am. State 718; 23 Atl. Rep. 405;

Mason vs. Moore, 73 Ohio State 275.

The testimony was excluded as irrelevant and immaterial.

The Court of Appeals sustained the admission of evidence of the custom of the cashier of this bank "for years" to write on the report to be published the names of directors likely to be in town. (Rec. p. 395.)

Mr. Andrews did not mention Chesbrough in this connection, saying only he "supposed the directors were informed about it in a general way." (Rec. p. 395.)

Defendant was not permitted to show whether directors who attested reports examined the books or verified the report by the statement. This was excluded.

Contrast this with the Court's ruling as to the admission of letters, papers in the bank, etc., which defendant knew nothing, and the testimony of Clark, the accountant, about the books from 1902 to 1908.

Points III and VII.

Eighth, Ninth and Thirteenth Assignments. (Rec. p. 427.)

These referred to rulings in connection with Chesbrough's absence from directors' meetings and will be referred to again in reference to dividends.

Tenth Assignment, (Rec. pp. 427, 393, 394) : Reports to the Comptroller. The law contemplates but one publication of the report, while several publications of each report were admitted in evidence. (Rec. p. 30). Also, over objection all the requests of the Comptroller for reports of this bank. It was not shown that any director had anything to do with publication. The law prescribes what shall be in the report. Suppose the board of directors had

charged off fifty per cent. of the Maltby paper April 1st, 1903, and assume that some stockholder seeing the large falling off in loans and discounts had sold his stock at half what it was really worth, and that afterwards all the paper, though charged off, should be paid, would such stockholder be permitted to recover his loss from any individual director?

The item of loans and discounts is only an inventory of the paper the bank has on hand, which has not been charged off.

The court refused to permit defendant's witness, James E. Davidson, to answer whether from time to time he had talked with Mr. Bump about the Maltby line. If they had talked together, and Mr. Bump had told him the paper ought to be charged off, plaintiff would have been eager to have that testimony in the record, but they evidently knew that Mr. Bump regarded the Maltby line as good, and that would have shown that both Mr. Bump and Mr. Davidson, two of the directors, did not think the paper should be charged off; without affirmative concurrence of four directors, none of it could have been charged off.

Not a single director testified, or was permitted to testify, except the two defendants, what he thought about its being charged off, within the time properly in question.

On the other hand Mr. McGraw was asked whether it was not true that the Maltby line was discussed by the board of directors at nearly every meeting.

This question was part of a method to find fault with the manner in which the business was done by Mr. Bump, when it was conceded on all hands that the drafts were not forwarded for acceptance, that it was idle to forward them, as the companies would not accept them; the busi-

ness was done in another way; namely, through the accounting departments of the different responsible companies which bought the products, and then defendant McGraw was asked whether he did not know that the loans above ten per cent. were in violation of law.

This was objected to as a legal question, not competent, but the objection was overruled, and the witness answered: "I never looked at it that way."

Neither did the Court of Appeals look at it in the way implied by the question, but the effect of the question and answer on the jury was very prejudicial to the defendant.

If talk with one was admissible, why not the other? Davidson was not a party to the suit.

"The written report of an officer of a National Bank to the Comptroller of Currency, made pursuant to section 5211 Revised Statutes of the United States, does not purport to give the actual or estimated value of the bank's property, and is incompetent alone as a basis from which to adduce the actual value of the bank's stock."

Patterson vs. Plummer, 86 N. W. 111; 3 Banking Cases 424.

The charge that these two directors were guilty of a knowing fraud by including a surplus account and a profit account in their bank statement, is without any foundation because it rests on the assumption that although the bank had loans and discounts sufficient to create this surplus and undivided profits, yet because portions of certain loans were not paid and, as determined years afterwards, were lost, therefore even before any losses accrued the surplus and profits had no existence and it was a knowing fraud to claim that they did exist. Such claim was not sustained by proof. They were properly listed and it would have been wrong not to have done so.

"Is the report false if it corresponds with the books?" As a matter of fact they did correspond and were truthful copies from the books and it was so conceded and treated upon the trial of a case in the Circuit Court involving the same facts and contentions as are put forth herein. This precise question has been answered by the United States Courts in at least one case,

U. S. vs. Graves, 53 Fed., 634.

and this authority has been before the Supreme Court of the United States and has escaped rejection or criticism by that Court. (165 U. S. 323.) In the *Graves* case the facts fully appear and that part of the opinion of the lower Court, which supports in the plainest possible way our contention in this case with reference to these reports, *was not criticised nor reversed* by the United States Supreme Court. That Court reversed it on the ground that the trial judge had not been *sufficiently liberal* in his instructions to the jury with reference to the law. He had practically told the jury, on the question of overdrafts that there was but one place in which they could properly be listed, but the Supreme Court held that as to those overdrafts which it had been arranged might be regarded as "loans" could properly be classified by the bank's officers among the other "loans and discounts" and they were not obliged to include them as "overdrafts." We are at a loss to see how the decision of the Supreme Court in the *Graves* case lends the slightest support to plaintiff's contention, here. The ruling in that case is clear on the point that it is not only proper, but it is probably obligatory for the bank's officers to include in their list of loans and discounts all the loans and discounts which appear upon their books, whether or not they are there classed as "suspended loans" or doubtful debts or claims, collection of which is doubtful.

See 53 Fed. 646.

If it would not constitute a "false entry" under the statute to so list them, it is perfectly plain that it could not be a false report if such items were embraced in the report which is simply a transcript of the bank's books.

"The report must be made by the *association* and be verified by the oath of the president or cashier and attested by the signatures of at least three of the directors."

Cochrane vs. U. S., 157 U. S., on p. 293.

It is insisted that if the bank had among its assets any paper which is not worth its face value, it is a false statement and a violation of the statute for directors to list such paper among the loans and discounts owned by the bank. They must include it in some account in the report, and the authorities have held that although it is carried on the books as "suspended loans" it may properly be included as "loans and discounts" in the bank's statement. This shows plainly that the report is merely an inventory. In a bank containing seven directors, the three directors who sign the report would not be a majority and would have no right to cancel the doubtful obligations or to cause them to be charged off to profit and loss. The only possible course which is open while the loans are held by the bank and before they are charged off in a legal and proper manner, is to include them where they belong among the loans and discounts owned by the bank as resources. It is inevitable that some should be better than others. No bank escapes losses and bad debts. The Supreme Court said in

U. S. vs. Britton, 108 U. S., 193, 196;

"There is no provision of the statute which forbids the discounting of a note not well secured, or both the maker and endorser of which are insolvent. It is within the discretion of the directors or

the officers or agents lawfully appointed by them to discount such a note if they see fit, and it might under certain circumstances, tend to the advantage of the association."

There is no middle course which directors can take.

There is no provision for classifying the loans and discounts as good, bad, doubtful, fair, etc. So far as the books of the bank are concerned, they stand as loans or discounts and should be listed as "loans and discounts" until they were classified as "suspended loans" on the books of the bank, still it is perfectly proper under the authority of *United States vs. Graves*, 53 Fed. 634, to include them among loans and discounts in the report to the Comptroller of the Currency. That these reports are simply inventories of a general character and not intended to be accurate and final criterions by which to judge the value of shares of the bank's capital stock is certainly shown by the provision in the last sentence of the section requiring reports (Sec. 5211 U. S. Comp. Laws). It is "The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition." If precise and detailed information is desired as to the loans and discounts, the Comptroller is thus empowered to require it as above.

Where reports as published show unexplained items and the State Banking Commissioner reports such items as assets, and a purchaser of stock relying on his report is deceived, the directors are not liable.

Penfold vs. Charleroir Savings Bank, 140 Mich. 126.

In *United States vs. Young*, 128 Fed., 111, a cashier was indicted for making a false entry. On demurrer to the

indictment Judge Jones said: "The cashier by including the item here in his 'cash items' did not declare that the check was good * * *. The legal effect of the entry is but a written representation to whom it may concern that the cashier, in an actual transaction, had received the check, and that the amount stated was the basis of one item, which went with others to make up the aggregate 'cash items' which the entry declared the cashier had at the time. The several counts assail the truth of the entry solely on the ground that the amount of one of the items which entered into the aggregate 'cash items' was based on a check or paper which was fraudulent and worthless, and known to be so at the time of the entry. The cashier in that event would be equally bound, as in the case of a good check bona fide received, in stating his transactions upon the books, to make a proper 'cash item' as to such check, irrespective of its being taken in good faith, or knowingly received in bad faith. The several counts do not deny that the truth had been stated in the entry, or that the check upon which the item was based had been received by the cashier in an actual transaction with the bank. The several counts, therefore, resolve themselves into an assertion that the recital truthfully made by the cashier of the fact that he has included in his 'cash items' an item based on a check received by him in an actual transaction with the bank, is converted into a false entry because he knew at the time the entry was made that the check was 'worthless and fraudulent,' etc. The fraud which entered into the consideration or taking of the check by the bank cannot obliterate or recall the fact that such a check was actually taken by the bank in a transaction with the cashier, who truly recited the fact upon the books. It cannot be a false entry to enter upon the books of the bank a correct recital as to the taking of the check and its inclusion as an item

in the aggregate 'cash items' of the bank. The truth of what the cashier actually did with the bank's cash as to this check, and statement he made about the cash in the entry on the books of the bank, is not altered in any way by the fact that he knew the check was 'worthless and fraudulent.' The entry, as we have seen, involved no assertion as to the value or bona fides of the check. It stated the exact truth of the transaction as it is entered on the cash account. It cannot be a false entry to make a recital on the books of the bank which speaks the truth."

This case was followed and approved, with explanations *United States vs. Morse*, 161, Fed. on page 436. (*Coffin vs. U. S.*, 156 U. S., 446; 15 Sup. Ct. 394, 39 L. Ed. 481; *Id.* 162 U. S. 682, 16 Sup. Ct. 943, 40 L. Ed. 1109; *Graves vs. U. S.*, 165 U. S. 324, 17 Sup. Ct. 393, 41 L. Ed. 732.) The averments here are quite different from those in the indictment in *United States vs. Britton*, 107 U. S. 657, 2 Sup. Ct. 512, 27 L. Ed. 520.

Mason vs. Moore, 73rd Ohio State, 275, is very nearly like the case at bar, and doctrine of that case was cited with approval by this in the Yates case above cited, on page 178.

In that case all the directors of the bank were sued for publishing a false report.

The action was based upon the reports to the comptroller, as printed in the local newspaper, attested by three directors, which reports, at a matter of fact, were false in certain particulars hereinafter set out in the full report of the case.

That case, like this, was brought by a person who alleged that he purchased stock relying upon the report, and

it was alleged that the reports were false in fact in many particulars.

The report was published December 27th, 1897, in the Lisbon, Ohio, "Journal"—

	Reported	In Fact
Loans and Discounts.....	\$ 74,208.01	\$ 40,000.00
Overdrafts	7,509.25	1,000.00
Total Resources	137,590.40	96,873.95
Individual Deposits	48,013.40	68,000.00
Demand Certificates of Deposit..	17,461.37	46,000.00
Bills Payable	6,000.00	19,000.00
Total Liabilities	137,590.54	199,115.44

As a matter of fact the bank was insolvent and this plaintiff who purchased stock relying on the report was compelled to pay an assessment on it of 100% made by the comptroller, yet plaintiff could not recover.

The syllabus is as follows and the decision was unanimous:

"1. BANKS AND BANKING—APPOINTMENT OF CASHIER—DUTIES AND LIABILITIES OF DIRECTORS.

To the directors of a bank are committed the general management and supervision of its affairs, but they are authorized to appoint a cashier and confer upon him the usual powers pertaining to such an office, and to him may be properly confided the custody of the money securities, and valuable papers of the bank, and the supervision of its books and accounts; and, while this does not absolve the directors from the duty of reasonable supervision and the exercise of that degree of care which is exercised by ordinarily careful and prudent men, acting under similar circumstances, yet they are not insurers of the fidelity of

the cashier and other agents whom they have appointed; and, where such directors act in good faith, and with ordinary care as defined above, they are not responsible for losses resulting from the wrongful acts or omissions of such cashier or other agents, unless the loss is a consequence of their own neglect of duty."

"2. The directors of a bank are not held, as a matter of law, to know all its affairs or what its books and papers would show, and such knowledge cannot be imputed to them for the purpose of charging them with liability."

"3. FRAUD—PURCHASE OF STOCK—ACTION AGAINST DIRECTORS—MISREPRESENTATIONS.

In an action against the directors of a national bank by one who purchases some of its stock, relying on the statements contained in its report to the Comptroller of the Currency as to its resources and liabilities, which report was attested by the directors and published as the statute directs, some of which statements are false, whereby the purchaser is damaged, it is not error for the court to charge the jury that 'It must appear by a preponderance of the evidence that, at the time of the attesting and publication of said report, the directors so attesting this report, or, who assented to and directed the publication of the same, did so knowing said report to be false, or under such circumstances as will warrant the jury in finding, by a preponderance of the evidence, that such director, or directors, by the exercise of ordinary care and prudence, would have known that the said report was false in some one or more of the particulars set forth in the petition.' "

That was an action by Mason against Reason B. Pritchard, William Moore, John McVicar, James K. Frew and

David A. Pritchard to recover \$2,000 damages which he sustained by the representations and talk of the defendants while acting as directors of the First National Bank of New Lisbon, Ohio. On the 21st of October, 1898, the Comptroller of the Currency took possession of the bank and later a receiver was appointed. On January 15, 1898, plaintiff below purchased 10 shares of the capital stock for the consideration of \$1,000. Later he was assessed 100% on his shares to pay the debts of the bank.

He alleged he had been deceived by the reports attested by directors Pritchard, Frew and McVicar. There was a judgment in favor of Moore affirmed by the Supreme Court.

It was claimed the report was false as above stated.

It was further alleged that on Dec. 15, 1897, and ever since the bank was insolvent and its capital stock utterly worthless, all of which was well known to the defendants, and that any examination of said report and of the books would have disclosed to defendants as such directors that said report was wholly false, and that said bank was being mismanaged, and its moneys and assets misappropriated and squandered; that said directors, in failing to exercise the slightest diligence or make the slightest investigation of the business of the bank, were grossly negligent of their duties. He further alleges that in purchasing his stock he relied upon the statements contained in said report as published, and believing them to be true, he made said purchase, which he would not have done if the true condition of the bank had been stated in the report. * * * The evidence further tended to show that the plaintiff relied on the statement contained in the report on the 15th of January, 1898, when he purchased the stock. * * * Reason B. Pritchard had died

during the pendency of the action, and the jury was not warranted in finding a verdict against his estate. The case was submitted as to the other two defendants, John McVicar and James K. Frew, and the verdict was in their favor, upon which the court rendered judgment. This judgment was affirmed by the Circuit Court, and the plaintiff prosecutes error to reverse both of said judgments.

Justice Price, after stating the facts, delivered the opinion of the court:

“* * * Having the qualifications named in Section 5146, and taking the oath prescribed in Section 5147, the directors entered upon the discharge of their duties. They were not required to be bookkeepers or to possess the expert or technical knowledge of bookkeeping usually adopted by the executive officers of such associations. When they attested the bank's report they did it as the act of ordinary men, or men of common and ordinary intelligence. This report had two purposes; Primarily to inform the Comptroller of the condition of the bank as to resources and liabilities; and its publication is for the information of the stockholders and the general public. There were no personal representations made to the plaintiff. As one of the public, he read the report and relied upon it in purchasing his stock, and was deceived. His action is grounded upon the deceit thus practiced upon him as a member of the public.”

“As to the liability of the bank and its directors, Section 5239, Rev. St. U. S. provides” (quoting statute):

“We have in this section the statutory standard of liability, and it relates to every director who ‘participated in or assented to’ the violations of the pro-

visions of the title of which said section form a part. If he did not participate in or assent to such violation, this statute fixes no individual or personal liability against him. In this case there was no evidence tending to prove that the defendants participated in or assented to any violation of the banking statute, except such participation or assent as may be ascribed to the attestation of the bank's report, and it would seem that such an act will not be sufficient to establish the participation and assent contemplated and penalized by the statute. Participating and assenting both imply affirmative action of some sort, as distinguished from mere silence and inaction. This statute does not preclude a liability at common law." * * *

"Diligent counsel have cited many adjudicated cases on the subject, to some of which we add others found in our own research. *Briggs vs. Spaulding*, 141 U. S. (Rep. Ed.), 132, 11 Sup. Ct., 924, 35 L. Ed., 662, is a leading case decided by a court frequently called upon to interpret the laws governing national banking associations. * * * It is true, as said by counsel, that the decision was made by a divided court, but it is the opinion of a majority, and that majority, as in all such cases, declares the law. But the dissenting opinion is not in conflict with the rule we here adopt. The case has wide support in the decisions of the courts of last resort in many States, some of which we will notice."

"*Kountze et al. vs. Kennedy*, 147 N. Y., 124, 41 N. E., 414, 29 L. R. A., 360, 49 Am. St. Rep., 651, was an action to recover damages for fraud and deceit alleged to have been practiced by Kennedy, by which plaintiff claimed

to have been induced to purchase certain stock and bonds of the Howe Machine Company, a corporation. Two of the prevailing principles of the case appear to be: (1) that in an action for deceit, the misrepresentation upon which an action is based must be shown not only to have been false and material, but it must be also shown that the defendant, when he made it, knew that it was false, or not knowing whether it was true or false, and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. (2) The written statement of the president of the corporation as to its entire assets and liabilities, and the fact that he furnished the statement as a statement of the entire assets and liabilities, were not of themselves sufficient to warrant the inference that he represented that the statement was true of his own knowledge. In *Spering's Appeal*, 71 Pa., 11, 10 Am. Rep., 684, it is held that directors in a stock corporation, as to the stockholders, are not technical trustees, but are as mandatories, and are bound to apply no more than ordinary skill and diligence. The Court, through Sharswood, J., reviews many cases and discusses the relation and reliability of directors at length. Decided in 1872. The same Court, in *Swentzel et al. vs. Penn. Bank et al.* (decided in 1892), 23 Atl., 405, 15 L. R. A., 304, 30 Am. St. Rep., 718, cites with approval *Spering's Appeal*, supra, and holds that: 'A director of a bank, whose services are gratuitous, and whose duties are to attend the bank once or twice a week to assist in discounting paper, to see how much money there is to loan, and once or twice a year to count the cash on hand and examine the bills receivable and securities to see whether they correspond with the statement furnished by the officers, does not owe the creditors of the bank such care as a reasonably prudent man exercises in his own business, but is amenable only for fraud, or for such

gross negligence as amounts to fraud.' In the opinion of *Parton, C. J.*, on page 414 of 23 Atl. (15 L. R. A., 305, 30 Am. St. Rep., 718), it is said: 'Negligence is the want of ordinary care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs is one thing, and the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give, in a short space of time, to the business of other persons from whom he receives no compensation.' The entire opinion is very pertinent to the controversy in the case at bar. See also *Cowley vs. Smyth*, 46 N. J. Law, 380, 50 Am. Rep., 432; *Wallace vs. Lincoln Savings Bank (Tenn.)*, 15 S. W., 448, 24 Am. St. Rep., 625; and *Clews et al. vs. Bardon (C. C.)*, 36 Fed. 617."

"*Utley vs. Hill et al. (Mo. Sup.)*, 55 S. W., 1901; 49 L. R. A., 323; 78 Am. St. Rep., 569, was an action by a depositor in a state bank against the directors to recover money lost by failure of the bank. By the statute of that state, such banks were required to make periodical reports to the Secretary of State, and the depositor claimed he was induced to make his deposit by reason of the representations consisting of the reports made to the Secretary of State. The Court laid down the rule recognized in the above cases. In *Warfield vs. Clark (Iowa)*, 91 N. W., 833, 834, it is held that, in an action against the secretary of an insurance company for deceit consisting of false representations contained in its official statement, an instruction that defendant was charged with knowledge of the true condition of the company, and if the statement filed by him was not correct, it was untrue and false, and so known to be by the defendant, was

erroneous, since the action could be maintained only on proof of active, conscious and intentional fraud. See also *Warner vs. Penoyer* (C. C.), 82 Fed., 181. That case was reviewed on appeal by the United States Circuit Court of Appeals, as found in volume 61 of the United States Appeals, at page 372 et seq., 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761. On page 379 of 61 U. S. App., page 591 of 91 Fed., page 226 of 33 C. C. A. (44 L. R. R.), the Court says: 'Before they (bank directors) can be made responsible for losses which have occurred through the mismanagement or dishonesty of the cashier, it must appear that such losses resulted as a consequence of the omission of some duty on their part. If in all probability these would have resulted just the same, notwithstanding they had been ordinarily diligent and vigilant, there is no justice in shifting them upon the directors, and no principle of law to justify it. They are responsible for their own acts and omissions, but not for those of co-directors in which they have not actively or passively participated.' See first paragraph of the syllabus of the case." * * *

"The directors of a bank are surely authorized to appoint a cashier, conferring upon him the powers usually exercised in such an office. He properly confided in as to the custody of its money, securities, books, and valuable papers, and the supervision of its books and accounts. While it is true that the directors cannot divest themselves of the duty of general supervision and control, they may properly intrust to him the powers usually appertaining to the direct management of the business, and, where they have acted in good faith and with ordinary diligence in their general supervision, they are liable for losses resulting through secret speculations and secret false entries of the cashier. Their position does not re-

quire them to devote themselves to the details of the business, which may be left to the clerks and bookkeepers under the supervision of the cashier. They are not required to look with suspicion upon the conduct of these agents or employes, nor to practice a system of espionage over the cashier or his subordinates, without apparent reason, and they have a right to assume they are honest and faithful, where no circumstances transpire to excite doubt or suspicion. On the other hand, they cannot excuse their indifference or negligence by pleading mere honesty of intention."

"We believe this is a fair summary of the law as deduced from the weightier cases and the opinions of text writers. In harmony with the authorities as we approve them, the trial Court instructed the jury in the present case with commendable clearness, and properly applied this law to the facts before the jury. It then was a question of fact for the jury to determine whether, under the rules submitted for its guidance, the defendants should be held liable. The verdict was for the defendants. The judgment rendered on the verdict was affirmed by the Circuit Court, and we are content with that judgment."

In the case of *Utley vs. Hill*, 55 S. W., 1091 (Mo.), (S. C. 49, L. R. A. 323), an action was brought by a depositor of the Citizens' Stock Bank against the directors to recover a deposit lost by the failure of the bank on account of a certain statutory liability, and because they had made certain reports of the bank's condition to the Secretary of State, as required by statute, and the Court held:

"The second proposition is, are directors of a bank liable to depositors, in a common law action for deceit, for statements made to the Secretary of

State, required by Section 2752, Rev. St. 1889, which were not true, but which they honestly believed were true, and which were, in good faith, based upon details furnished to them by the cashier of the bank, whose reputation was good. The decision of this Court in *Fusz vs. Spaunhorst*, 67 Mo., 264, that, 'aside from statutory provisions or one of similar nature in the organic law, the directors or officers of an incorporated bank would not be individually responsible, in an action at law, for injury resulting to a creditor or depositor, unless the injury were occasioned by the malicious or fraudulent act of the party complained of. Mere nonfeasance will not answer. Nothing short of active participation in a positively wrongful act, intendedly and directly operating injuriously to the prejudice of the party complaining, will give origin to individual liability as above indicated,'—must be taken as the major premise of the syllogism by which this proposition is solvable. And the duty of directors of a bank, under the law, in making statements to the Secretary of State, is the minor premise. * * *

"The principle upon which directors have been held liable in those cases is that *they knew the statement to be false*, not merely that they might, by ordinary care, have known that fact, and that, if they acted in making such statements in good faith, upon details furnished by the ordinary managers and clerks whom they have employed, they cannot be held liable to a common-law action of deceit. *Pieratt vs. Young* (Ky.), 49 S. W., 964; *Cowley vs. Smyth*, 46 N. J. Law, 380; 1 Cook, Stock, Stockh. & Corp. Law (3rd Ed.), Sec. 158, etc."

The case of *Briggs vs. Spaulding*, 141 U. S., 132, and the other cases cited in the opinion of the Supreme Court of Ohio in *Mason vs. Moore, supra*, make it unnecessary to make a further reference to those cases.

"The entry of 'Loans and discounts' in reports to the Comptroller (of the Currency) does not guaranty the solvency of the makers of the paper, but it is a statement that in truth and in fact, at the date named in the report, the bank actually held and owned loans and discounts to the aggregate therein reported." *United States vs. Graves*, 53 Fed. on p. 646.

In *Wallace vs. Lincoln Savings Bank*, decided by the Supreme Court of Tennessee, Fed. 14, 1891, 15 S. W. Rep., 448, the Court held:

"Bank directors are not expected to give their whole time and attention to the business of the company. The customary method in regard to such associations is that the active management and responsible custody is left to the cashier and other agents selected by the directors for that purpose. These are paid salaries demanding their skill, and time should be given to the duties of immediate management. As a rule, the custodian of the assets is the cashier. The duty of directors with respect to such is to supervise, direct, and control. These agents, though usually selected by the directors, are not the agents of the directors, but agents of the corporation. Mor. Priv. Corp. Sec. 552. * * * They are not insurers of their fidelity, and they are not liable for their acts on any principle of the law of agency, etc."

A well considered case is that of *Swentzel et al. vs. Penn Bank et al.*, decided in the Supreme Court of Pennsylvania, Jan. 4, 1892, 23 Atl. Rep., 405.

"A bank president, abetted by the cashier and several clerks, embezzled almost all the funds of the bank, and concealed the fraud by false entries in the books. His statements to the directors from time to time showed the bank to be in good condition. No fraud was discoverable in any of the books except the individual ledger, which, by a rule of the bank conforming to a custom largely prevalent, the directors were not allowed to see. The directors were among the heaviest stockholders, and at the first suspension they raised nearly \$300,000 on their individual credit to enable the bank to resume payment. HELD, that the directors were not guilty of gross negligence."

Paxson, C. J., who delivered the opinion of the Court, said:

"It cannot be the rule that the director of a bank is to be held to the same ordinary care that he takes of his own affairs. He receives no compensation for his services. He is a gratuitous mandatar. His principle business at the bank is to assist in discounting paper, and for that purpose he attends at the bank at stated periods—generally once or twice a week—for an hour or two. The condition of the bank is then laid before him in order that he may know how much money there is to loan. Once or twice a year there is an examination of the condition of the bank in which he participates. The cash on hand is counted, the bills receivable and securities examined, to see whether they correspond with the statement as furnished

by the officers. Beyond this he has little to do with either the cash or the books of the bank. They are in the care of salaried officials, who are paid for such service, and selected by reason of their supposed integrity and fitness. To expect a director, under such circumstances, to give the affairs of the bank the same care that he takes of his own business, is unreasonable, and few responsible men would be willing to serve upon such terms. In the case of a city bank, doing a large business he would be obliged to abandon his own affairs entirely. A business man generally understands the details of his own business, but a bank director cannot grasp the details of a large bank without devoting all his time to it, to the utter neglect of his own affairs."

"A vast amount of authority has been cited upon this question which we do not think it necessary to review. It is sufficient to refer to a few cases only. In *Sperling's Appeal*, 1 Pa. St., 11, the subject is very fully discussed by the late Justice Sharswood, and the rule of ordinary care is laid down. Not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director, in the business of a bank. Negligence is want of care according to the circumstances, and, the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing, and the ordinary care of a gratuitous mandatary is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give, in a short space of time, to the business of other persons from whom he receives no compensation. The

same learned judge, in *Maisch vs. Savings Fund*, 5 Phila., 30, laid down the rule as follows: 'As to the directors, however * * * receiving no benefit or advantage, they can be considered only as gratuitous mandataries, liable only for fraud or such gross negligence as amounts to fraud.' Again, in *Spring's Appeal*, *supra*, he said: 'Indeed, as the directors are themselves stockholders, interested as well as all others that the affairs and business of the corporation should be successful, when we ascertain and determine that they have not sought to make any profit not common to all the stockholders, we raise a strong presumption that they have brought to the administration their best judgment and skill.' We may also refer to *Briggs vs. Spaulding*, 141 U. S., 132, 11 Sup. Ct. Rep., 924, which goes even further than our cases upon this point. It does not relieve a director from the consequence of gross negligence in the performance of his duty, but it holds that he is not responsible where he has used the ordinary care which bank directors usually exercise. It is true this was the case of a national bank, but we apprehend that what is negligence on the part of a director of a national bank would, as a general rule, be negligence by a director of a state bank, and subject to the same liability."

"In regard to what is ordinary care, regard must be had to the usages of the particular business. Thus, if the director of a bank performed his duties as such in the same manner as they were performed by all other directors of all other banks in the same city, it could not fairly be said that he was guilty of gross negligence; and care must be taken that we

do not hold mere gratuitous mandataries to such a severe rule as to drive all honest men out of such positions. This thought is so well expressed by Sir George Jessel, M. R., in his opinion in *Re Dean Coal Min. Co.*, 10 Ch. Div., 459, that I give his remarks in full: 'One must be very careful, in administering the law of joint stock companies, not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and, perhaps all men who have any character to lose, from becoming directors of companies at all. On the other hand, I think the Court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Wilful default no doubt includes the case of a neglect to sue, though he might, by suing earlier, have recovered a trust fund; in that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle.' Holding then, the rule to be that directors, who are gratuitous mandataries, are only liable for fraud, or for such gross negligence as amounts to fraud, it remains but to apply this principle to the facts in this case."

"It is not alleged—it has never been alleged—that the hands of these directors are stained by fraud. The bank was wrecked by its president, with the cashier and some of the clerks aiding and abetting. It was adroitly done, so far as the means were concerned, and it was concealed wholly from the directors. False entries were made in the books, and false accounts, or accounts with fictitious persons, were opened so as to hide the theft. The reports of

the bank's condition made by the president to the directors from time to time, showed it to be in good condition, while in point of fact it was honey-combed with fraud, and its assets squandered in wild speculations. It may be asked, why did not the directors discover this by an examination of the books? The answer is that if they had examined every book in the bank, with a single exception, they would not have found the fraud. That exception is the individual ledger. All the frauds were dumped into this book, and appeared nowhere else. The individual ledger contains the accounts of the individual depositors, and this book, by the rules of a large majority of the Pittsburg banks, the directors are not allowed to see. This is a rule of policy on the part of most city banks, and the reason for it is at least plausible. A director largely engaged in business may have a number of rivals in the same business who are depositors in the bank. If he is permitted to examine their accounts, it gives him an advantage, and an insight into a rival's affairs that few business men would tolerate. Hence it is a question with many banks whether to adopt this rule, or lose valuable customers, and they generally prefer the former. We are not speaking of the wisdom of the rule, only of its existence, as bearing upon the question of the directors' negligence. Are they to be held to be guilty of gross negligence in not examining a book which, by the rules of their own bank, and of four-fifths of the other banks in Pittsburg, the directors are not permitted to see?"

"Nor do we think the directors are bound to regard the statements submitted to them as false, and the president, cashier, and clerks as thieves. They

had nothing to arouse suspicion. All of these gentlemen stood high. They were the trusted agents of the corporation, paid for their services, and regarded in the community in which they lived as honest men. Aside from this, the directors were among the heaviest stockholders of the bank. They collectively owned a large portion of it. And so thoroughly were they deceived by the president as to its condition that when the first stoppage occurred they not only believed the suspension temporary, but they showed their faith by their works, and upon their individual credit raised the sum of \$289,000 to enable it to resume. They did not desert the ship like a parcel of drowning rats, but imperiled their private fortunes in an effort to keep it afloat. Under such circumstances, it would be an act of gross injustice to hold them liable for the frauds of others, in which they had not participated—of which they had no knowledge—and which have only been brought to light with the aid of experts. We must measure this transaction by the light which these directors had at the time the transaction occurred. It would be unfair to judge them by the calcium light which has been turned on for six years, and which had enabled us to trace at least the sinuous path of Riddle and his confederates in crime, and the means by which this bank has been robbed and plundered. We are of opinion that the master and the court below were right in their conclusion, and the decree is affirmed upon the appeal of the assignee, and the appeal dismissed, at his costs."

The expression, "desert the ship" has often been used by plaintiff's counsel in this case, but defendants did not desert the ship. They both retained a portion of their

stock, Chesbrough, who was leaving the city, keeping a thousand dollars, and McGraw two thousand five hundred, and both, and all the directors kept their accounts in this bank.

In the case of Warfield vs. Clark, 91 N. W. Rep., 833, decided Oct. 14, 1902, by the Supreme Court of Iowa, it was held:

"In an action against the secretary of an insurance company for deceit consisting of false representations contained in its official statement, an instruction that defendant was charged with knowledge of the true condition of the company, and, if the statement filed by him was not correct, it was untrue and false, and so known to be by the defendant, was erroneous, since the action could be maintained only on proof of active, conscious and intentional fraud and misrepresentation."

"In an action against the secretary of an insurance company for deceit consisting of false representations in its official statement, evidence that defendant in making the statement acted under the advice of counsel as to his intent, were admissible."

"In an action for deceit against the secretary of an insurance company for false representations in a statement, an instruction that, if the jury found a substantial difference between the actual and reported losses, it should find that the defendant intended to deceive and defraud, was erroneous, as invading the province of the jury."

"SHERWIN, J. * * * The jury was told as a matter of law that the defendant was charged with knowledge of the true condition of the company on the 31st day of December, 1897, and that, if the statement filed by him did not correctly report its condition, it was untrue and false,

and so known to be by the defendant. This instruction cannot be sustained. This action is founded on active and conscious misrepresentation as to the condition of the company, and can only be sustained by proof of intentional fraud. It cannot be predicated on negligence, however gross. *Boddy vs. Henry*, 113 Iowa, 462, 85 N. W. 771, 53 L. R. A. 769; *Kountze vs. Kennedy*, 147 N. Y., 129, 41 N. E. 414, 29 L. R. A. 360, 49. Am. St. Rep. 651; *Cook, Stock, Stockh. & Corp. Law* (2nd Ed.), Sec. 355; *Bish. Noncont. Law*, Sec. 316. And for this reason testimony that the defendant was acting under advice of counsel and of the auditor of state was competent and material, as was also his own testimony as to his intent. *Counselman vs. Reichart*, 103 Iowa, 430, 72 N. W. 490."

"In its fourth instruction the Court told the jury that, if it found a substantial difference between the actual and reported losses, it should find that the defendant intended to deceive and defraud. This was error, for it not only invaded the province of the jury on a question of fact, but announced an incorrect proposition of law, as we have heretofore said."

Directors do not insure the fidelity and honesty of those employed by them. They are gratuitous bailees, and not responsible for loss unless occasioned by fraud or gross negligence on their part.

Dunn's Executor vs. Kyle's Administrator, 14 Bush, 135.

Wallace vs. Lincoln Savings Bank, 89 Tenn. 630.

Justice Peckham, rendering the opinion of the Court, *McDonald Rec. vs. Williams*, in an action by the receiver of an insolvent national bank to recover a dividend, said, on page 406, 2nd Par.: "One is not usually said to permit an act which he is wholly ignorant of, nor would he be

said to consent to an act of the commission of which he had no knowledge."

Eleventh Assignment, (Rec. p. 427, 32): When the second and third publications of the report of June 9th, 1903, was offered, counsel for Chesbrough asked, after his objection was overruled "that that report be not considered against Chesbrough because not signed by him."

Plaintiff's Counsel:

"I contend that, for the present, any statement made in this case and that report was made from the books of the Old Second National Bank, kept under the directions of both the defendants, with the knowledge that the paper of the Maltby Company to the extent of \$220,000.00 was not then charged off, and it was, also, published with the knowledge of both the defendants, that such report would be published from the books of the bank, and would so report the condition of the bank, when it should have been charged off a year ago."

Twelfth Assignment, (Rec. p. 451, 34): Plaintiff's counsel asked him a leading question in reference to the report of Nov. 17, 1903, and to his last purchase of stock on Dec. 16, 1903: "Mr. Woodworth, did you rely solely upon this statement, etc?" After all his experience and knowledge of the bank and Maltby, he was so anxious to buy this stock that he gave his note for it. (Rec. p. 34.)

Point VI.

Fourteenth Assignment, (Rec. p. 428, 3d, 10th, 88th and 116th Assignments in Court of Appeals, R): After the counts in relation to dividends were stricken out by the Court of Appeals it again admitted them as part of the tenth count, composed in part of all the others.

In another part of this brief it is shown that this defendant had no part in ordering the June, 1903, dividend and the one in Dec., 1903, was paid under the advice of counsel (Rec. p. 241) and in good faith, according to the uncontradicted testimony in the record.

The December dividend having been ordered and paid after Nov. 17, 1903, was inadmissible in evidence.

Plaintiff was also permitted over seasonable objection to show the dividends paid from 1897 to Nov 17, 1903. (Rec. ante.)

In Dec., 1903 and after it would not have been proper to pay dividends, and yet the plaintiff was allowed over objection to say he had received no dividend after that, equivalent to saying he had received none for the nine years preceding the trial.

Point IX.

Fifteenth Assignment, (Rec. p. 452): The failure to charge off Maltby Company paper as a bad debt was referred to in the opinion reversing the former judgment, and the plaintiff on the second trial attempted to get within the ruling and proceeded upon an entirely different theory from that set up in his declaration, and sought to be proved on the first trial.

Defendants were charged with making false reports by attesting the reports published in the paper, as required by law. Two directors, out of seven, were practically on trial for not charging off this paper, a thing which they could not possibly do, even if they had wished to do so.

The board, as a board, was not charged with any neglectful duty in not charging off paper, and under the uncontradicted testimony of Mr. Andrews there was not a

dollar of the paper that should have been charged off prior to the time limited in this case; namely, November 17th, 1903. Each of the defendants testified that he did not regard the paper as bad or proper to be charged off, and the court would not permit the other directors to testify that they regarded it as good.

The theory of this court seemed to be that if there was a neglect of duty, in reference to charging off the paper, on the part of all the members of the board, then the two defendants might be individually responsible for their non-action, but this was no such case.

Neither the comptroller of the currency, the different bank examiners, the president of the bank, the cashier of the bank, or any director of the bank, within the time properly covered in this suit, regarded this paper as bad, or doubtful, and there was no reason why it should be charged off; on the contrary, so far as the court would permit testimony on the subject, it was proved to be considered good in 1903 and if the court had permitted the other directors to testify they would have testified that they thought it to be good, but because two or three years after the time in question here, some of the paper turned out to be bad, the jury were allowed to find, in the absence of all testimony on the subject, competent to prove the fact, that that paper should have been charged off. And this was done under the guise of a "history of the transaction." The jury were permitted to find that because there was a loss in 1905, the directors must have known it in 1903.

In order to show that Chesbrough neglected his duty as a member of the board, and that the paper should have been charged off, it would be necessary to show that the board knew that certain paper was not good, and the

proof as to this fact should have been confined to the time in question, and upon that question the knowledge and belief of the different members of the board was admissible and important. If all the board thought the paper good, then no one of the board could be called to account in this action, because the paper was not charged off and appeared in the reports called for by the comptroller. These reports are unquestioned and true according to the books of the bank.

The Court of Appeals said:

"The sole primary issue is whether defendants caused or permitted to be made a statement of the bank's condition, upon which statement plaintiff relied to his injury, and which statement defendants knew was materially false."

This is the state of facts which should have been proven and was not proven.

In order to prove what defendants should have done in 1903, plaintiff was asked at the trial why was not more than \$135,000 charged off in 1905.

This was not competent under the issue as determined by the Court of Appeals, but the Trial Court overruled the objection and permitted the witness to answer, that more was not charged off, because they didn't have surplus enough, and he was permitted to answer further, in reference to the reduction of the capital stock, and \$72,000.00 of the Brotherton paper, and \$135,000.00 of Maltby paper, making \$300,000.00 wiped out.

This testimony before a jury would be very damaging; would mean a loss in their view of \$300,000.00—for none of which either defendant was responsible in this action, and the \$72,000.00; namely, the Brotherton loss, had been

expressly excluded from the consideration of this case by the former opinion of this court.

There is no more warrant for saying that the new board could not charge off more than \$135,000 without closing the doors of the bank, for upon this subject, the judgment of the comptroller of the currency, who was apprised all the time from the examinations reported to him what the condition of the bank was, was the absolute judge of the solvency of the bank, and this evidence related to the period nearly two years beyond the time when the last action complained of was taken; namely, the report of November, 1903, and was therefore inadmissible and was highly prejudicial to defendant.

The directors of the bank believed in 1902 and 1903 that the Maltby line was good and secure.

Director James E. Davidson was asked: What assurance Bump, the president of the bank, gave him with reference to the Maltby paper prior to November 17th, 1903, and the court excluded the answer.

It also refused to permit the same witness to state that he regarded the line of Maltby paper as secure.

The court refused to permit defendant Chesbrough to answer the question, on re-direct examination, whether he believed the loans and discounts, in April, 1903, worth the amount listed in the statement, so far as anybody could estimate the same.

This was objected to as leading, and excluded by the court, while at another place, the court said: "Leading questions often save time."

The court, refused to permit defendant Chesbrough to testify as to who the other directors relied upon in reference to the Maltby line.

And, also, refused to permit him to state what his belief was in 1903 as to the paper being secure.

The witness, Foss (R. 254), was not allowed to answer that he regarded the Maltby paper as secure during 1903, nor that the board of directors relied upon Mr. Bump's statement in regard to this paper that it was good, nor was he allowed to give the information he had received from Mr. Bump at the time with reference to the Maltby line, and he was, also, prevented from testifying that he regarded the Maltby line as secured in January, 1903, and what the judgment of the board at that time was as to whether it regarded it as secure.

Mr. Andrews, cashier of the bank, called for defendants, was asked on re-direct examination.

"State whether or not in 1903, you heard talk among the directors of the bank that the Maltby Company loan was perfectly secured?"

This was objected to as hearsay. Objection was sustained; the testimony excluded.

"Q. Mr. Andrews, after the deeds and bills of sale were given by Maltby to the Old Second National Bank or to James Davidson as trustee of the bank, transferring all his property, you may state whether or not you heard it discussed among the directors that they considered the loan of Maltby perfectly secure and the security good, and worth every dollar of it?"

To which the same objection was made. The answer was excluded, and an exception was taken for the defendants.

Plaintiff never alleged and never proved that the board of directors knowingly refused or neglected to charge off the Maltby paper as bad.

Both defendants testified that up to and beyond the time in question they regarded the paper as good. (McGraw, Rec. p. 187, Chesbrough, Rec. pp. 261, 266.)

The other directors who would have testified the same way, were not permitted to do so. (Foss, Rec. p. 351, Davidson, director and president, Rec. p. 232, Collins, the bank's attorney, Rec. pp. 241-2, Andrews, Rec. p. —, cashier and director.)

Of the seven directors in office in 1902 and 1903, Orrin Bump had taken a vacation on account of illness in 1902 and resigned in 1903, and died before this suit began. A. J. Cooke resigned September 4th, 1903, and was dead before this suit was begun. James Davidson, on account of deafness, could not be examined as a witness, and even if he could testify the trial court would not have admitted it.

The testimony of directors, Edgar B. Foss and James E. Davidson was excluded.

The remaining two were the defendants, and they both testified they regarded the Maltby paper good, and their testimony was not contradicted by any competent testimony.

The same objection applies to the proof offered in behalf of the directors not sued as applies in case of the defendant, for they could not be held on account of what happened seven or eight years after the paper was taken, for non-action; that is not charging it off soon after the paper was taken, when they considered it good on account of their reliance upon Mr. Bump, and on the other testimony in the case, and even after the paper was questioned, because they considered it amply secured.

"Bad debts" are *defined by the statute itself* as "all debts due to any association, on which interest is past due

and unpaid for a period of six months, unless the same are well secured, and in process of collection."

U. S. Comp. Laws, 5204.

There was nothing in the pleadings or proofs on the first trial about bad debts not being charged off.

There was no allegation that the board of directors should have charged off any particular paper.

This contention was urged on the second trial because this court in its opinion referred to "the underlying wrong" of not charging off paper.

In the case of *Cassidy vs. Uhlman*, New York Court of Appeals, 170 N. Y., on p. 538, in a suit against three directors of a National Bank, Judge Martin, with whom Ch. J. Parker and Haight J. concurred, said:

"Manifestly, the defendant as one of its eleven directors had no power to close the bank, as it was in charge of its executive officers of whom he was not one, and who were subject only to direction and dictation by the board. Powerless as such to close the bank, powerless to protect the depositors, powerless by his advice to secure their protection by others, and having done all in his power, he could do no more. What was he to do? Was he required to step outside of his duties as a director and advertise the bank's insolvency, to stand upon the street corner or in front of the bank and proclaim his opinion as to its actual condition, while evidently not possessed of sufficient information to judge correctly or definitely as to its solvency? We think not. If he had pursued the latter course, and it had ultimately transpired that the bank was solvent, as to which he might well then have been in doubt, he would surely have been liable to the

bank or its stockholders for any damages that might have been sustained by reason of his action in that respect. Were the circumstances such as required him at his peril to perform an impossibility, or can he be held liable for fraud in not performing an act which he had no legal authority to perform? In other words, was he bound to incur the jeopardy of a course which might make him liable for many thousands of dollars by proclaiming, as a fact, a condition which could not be ascertained with certainty at that time? We think he was not required to accept any such alternative."

Point XIV.

Nov. 17, '03. HISTORY OF "ENTIRE TRANSACTION" (Rec. p. 373).

The exceptions dealing with alleged errors in receiving testimony of the "history of the case" after November 17th, 1903, which was the last date on which a report was made by either defendant, was based upon the first opinion of the Court of Appeals, where it said, referring to plaintiff's purchase of stock on December 16th, 1903:

"The defendants' liability can not be estimated of this date; their latest act, which was constructively a representation of fact by them to the plaintiff, was during the previous month." (November 17th.)

Notwithstanding this, the plaintiff was permitted to show, over objection, that the reason why more than \$135,000.00 of the Maltby paper was not charged off in January, 1905, was because they (the bank) didn't have surplus enough to do it, and he was, also, permitted to show, over objection, when he attested the statements to

the comptroller January 11th and May 29th, 1905, that a short time afterwards, more of the paper was charged off to profit and loss, and not only that, but the plaintiff was allowed to show that \$300,000.00 in all had been lost by the bank, not only on account of the Maltby paper merged in the Maltby Cedar Company paper, but he included the \$73,000.00 of the Brotherton loss, which had been expressly excluded by the Court of Appeals.

This error was repeated in the ruling on the testimony of Mr. Andrews where he was required, over defendants' objection, to show by the profit and loss account of the Old Second National Bank made February 20th, 1905, "Maltby Cedar Company, successor of Maltby Lumber Company, \$135,000.00."

This was objected to as incompetent, not only because it occurred after the date of November 17th, 1903, but it occurred in 1905, when the defendant McGraw was not a director in the bank, and Mr. Andrews was required to answer further, over objection, that the entire amount of the Maltby paper finally charged off to profit and loss, and of course, this was after January, 1905, was \$155,000.00.

This same question arose, in regard to the testimony of the accountant, who was permitted to show, over counsel's objection, the history of the paper after November 17th, 1903 (Rec. pp. 145, 147, et seq.).

The question again occurred with reference to the testimony of Mr. Andrews, the cashier, when plaintiff's counsel wanted to carry the history down to December, 1903, and the court made the same ruling, admitting the testimony, notwithstanding the objection, as to the date, was specifically pointed out.

Upon this examination, no limit was given the question relating to happenings up to the very time of the trial.

Chesbrough was questioned as to the entire year of 1904 in relation to the history of this paper. When objection was made, plaintiff's counsel stated that they were not claiming any "probative force" for what occurred in 1904. If they were not, it was idle and harmful to admit the testimony. There was probably not a man on the jury who knew what "probative force" meant, and the excuse given that the question was asked to test the credibility of the witness, fails to convince.

In order to present this same question again to the court, free from any complication, and state it in simple and direct terms, the defendants' counsel moved to strike out of the case anything relating to any matter happening after November 17th, 1903, with the exception of the reports signed by Mr. Woodworth, January 11th and May 29th, 1905, basing the motion directly upon the ruling of the Court of Appeals, which motion was denied (Rec. p. 373).

In its second opinion the Court of Appeals said in the trial of this issue:

"The detailed history of the entire transaction and each defendant's connection is, speaking generally, admissible as tending to show whether the loans were at the time in question in fact bad, and whether each defendant knew that fact, but not as otherwise establishing any liability."

The trial court construed this to mean the history of the Maltby paper from the time it was taken to the time of the trial, many years later, and permitted the jury to charge the defendant with knowledge which did not exist for

several years after the transactions in question occurred, and none of which was known prior to November 17th, 1903.

What is the "entire transaction?"

Evidently the facts pertaining to the Maltby paper, and the knowledge of Mr. Chesbrough relating thereto up to November 17th, 1903.

Whatever occurred after that time, was not the history of the transaction within the meaning of this court, because it is unquestioned that defendant could only be held for signing a report which he knew to be false.

The fault, if any, should be established by proof; namely, the failure of the board to charge off bad paper, and before they would do that, they must be convinced that it was bad, and it will be remembered that none of this paper was past due for six months, nor for any time, nor was the interest unpaid; on the contrary, the notes were live paper secured as the directors believed, and there was no reason, during the time in question, why they should have charged it off.

Sixteenth Assignment, (Rec. p. 430): This was based on the overruling of the assignment relating to the charge of the trial court.

"Plaintiff was not obliged to sue all the directors, but "had a right to select the two defendants and sue them alone." (Rec. 386.)

At the commencement of the trial the Court said: The decision (of Court of Appeals) says when a director finds out that a loan is bad, etc., it must be charged to profit and loss. * * * Each director when he finds that out must do the right thing to charge that off." (Rec. p. 29.)

It is not contended that if all the directors were charged with a violation of the statute, one or more of those directors equally blamable might be sued separately. If one director had knowledge of paper being worthless, which he did communicate to the board that might render him liable, but this is no such case. Defendant on the trial was charged with not charging off paper, which he alone could not do.

The entire board or a majority must be liable first.

Point II.

Bearing in mind the recent decision of this court, *Jones National Bank vs. Yates*, and the other cases growing out of the failure of the Capitol National Bank, it is respectfully submitted that this case differs from those in most of their essential particulars, which is pointed out elsewhere in this brief.

The banking statute of New York was apparently the prototype of the section of the National Bank Act (Rec. Sec. 5239) upon which this action is based and the question raised by this assignment was the same as that under the New York Statute in *Gaffney vs. Colville*, 6th Hill (N. Y.), 567, *Same vs. Emmet*, *Same vs. Tallmadge*.

The three cases against Colville, Emmet & Tallmadge were heard together.

The actions were brought under a statute of the State of New York by a stockholder in the Lafayette Bank of the City of New York, against defendant as a director of the bank * * * in connection with other directors of said bank, and together with the defendant, forming a majority of the directors thereof wrongfully and unlawfully caused a dividend of three and a half cents on the

dollar for every dollar of their capital stock to be made of the stockholders of the bank, out of the capital stock of the bank, and not out of the surplus profits thereof, contrary to the statute, etc., whereby the plaintiff's stock was depreciated, etc.

The eighth count contained the substance of all the others, with allegations of additional acts of the defendant; and charged that he alone did the wrongs complained of.

The declarations against the other defendants were substantially the same.

Special demurrers were interposed in the several suits to each count of the declarations respectively, and the plaintiff joined in the demurrer.

The first and tenth sections of the statute upon which the suit is based, was quoted in the margin of the case in the New York Common Law Reports, and Section 10 was as follows:

"Every director who shall violate, or be concerned in violating any provision, in the preceding sections of this article contained, shall be liable personally to the creditors and stockholders respectively, of the corporation of which he shall be a director, to the full extent of any loss they may respectively sustain from such violation."

Judge Bronson, rendering the opinion of the court, said:

"The acts of which the plaintiff complains are not such as could be done by a single director. They could only be done by a Board of Directors, which could not be formed without the presence of seven directors at the least, of whom four must

have concurred in the order which was made. I do not see, therefore, how it is possible to support the counts which allege that the defendant alone did the wrong. We see from the nature of the case that the thing was impossible."

The judge then refers to the statute above quoted, and continues: * * *

"Indeed, it is difficult to suppose that the words 'every director' were not used for the very purpose of giving a several action against each one of them. They may be sued separately, because the statute has so provided. But in declaring against one, it must be alleged that he had the concurrence of others in doing the act, for the reason that he could not have done it alone.

* * *

"The eighth count charges the defendant with a violation of each and all of the subdivisions of the first section of the statute, and is, I think, bad for duplicity. I see no sufficient objection against stating in one count that there were a great number of violations of any one subdivision of the section; but it would be going too far to allow the plaintiff to complain in the same count of several acts of a different nature." * * *

The conclusion was that the plaintiff was entitled to judgment on the demurrer to the second count (which related to a dividend), and the defendant is entitled to judgment on the demurrers to all the other counts.

The two defendants in this case could not attest a report. The law requires three.

They could not declare a dividend. That required at least four.

They could not charge off any paper. That required at least four.

Point VII.

Seventeenth Assignment (Rec. p. 431): The Trial Court excluded the evidence of the other living directors as to their belief in 1902 that the Maltby paper was good, and in 1903 that it was good and secured by the deeds, general collateral agreement, chattel mortgage, etc. The Court also excluded evidence as to what other directors did (Rec. p. 351 Foss, Davidson, 232, 233 Andrews). If the directors believed it good, they would not charge it off, and for the same reasons that are set forth under the Fifteenth Assignment of Error.

Point XI.

Eighteenth and Nineteenth Assignments of Error (Rec. p. 432): James M. Lewis, a bookkeeper and insurance agent, who had no knowledge of the timber business, poles, ties, telephone, or telegraph poles, shingles, lumber, laths, or land. He knew nothing about titles to land. He was put in the Maltby office at Bay City soon after January, 1903, after Mr. Maltby had given securities to the bank, to look after the financial end of the Maltby business in the interest of the bank, and great stress was laid upon the fact that his being there "was kept a secret from the public." The bank had a perfect right to put him there and it owed no duty to anyone to proclaim the fact from the housetops, or in any other way. There was no secrecy about it in any way; nothing was done that the bank did not have a perfect right to do.

Plaintiff undertook to show by this witness about the management of the property which the bank had as security, in which his testimony shows that the matter was mis-

managed; also, about the lands of which he knew nothing, except by hearsay, or with reference to some sales of the Maltby property.

The statement about secrecy was elicited by an incompetent and leading question over defendants' objection:

"To what extent was your connection with the bank kept secret, if at all?"

"A. It was supposed to be a secret to everybody except Maltby and his son. The other clerks were not supposed to know I was there for anything more than a hired regular clerk in the office. My duties were to look after the finances, open the mail, and take care of the bank account. Alvin Maltby was the apparent manager of the business. * * * I don't remember whether Maltby was paid a salary or not. He gave his entire time to the business from January 1st, 1903, to the fall of 1904." (Rec. p. 118, McGraw 207.)

At this time defendant Chesbrough was absent. Woodworth knew nothing about it, although the office was in the same building as his own and the bank.

Defendant Chesbrough was asked on cross-examination, without fixing any time, whether he knew Lewis was ostensibly a Maltby employe. After objection was overruled, he said he knew Lewis was in but did not know he was so held out. He was then asked about what "he wanted the public to know about Lewis was representing the bank" (Rec. pp. 408, 409). Leading questions were asked this witness as to replenishing broken stocks of poles and ties, pushing the sales, value of the property, in which he said he was competent though he had no experience; that he realized, as he thought, the full value of the assets

when the record shows the business in merchandise and lands was greatly injured because it was curtailed, and the contracts with the railroad and telegraph companies were not carried out, and a profitable business which Maltby had been nearly ten years in building up was greatly mismanaged (Rec. pp. 398, 399).

Lewis, over objection, was required to answer when the Maltby Cedar Co. was organized. Its organization must have been in writing and defendants' objection of incompetency should have been sustained. The answer, "In July, 1904," made the error worse. That was about eight months after the limit of time set, Nov. 17, 1903.

Point XIV.

The Twentieth Assignment of Error (Rec. p. 373) includes the review of the denial of defendants' motion to strike out all the evidence in the case relating to things which happened after Nov. 17, 1903, in accordance with the first opinion of the Court of Appeals (Rec. p. 433). It is argued under the Fifteenth Assignment of Error.

In opposition to defendants' motion for a verdict and in the Court of Appeals much stress was laid upon the McGraw report, Exhibit 223, called "Recapitulation of Stock of Maltby Lumber Company" (Rec. p. 218).

McGraw's testimony was that this report, which differed in some particulars from Maltby's inventory of October 31st, 1902, was submitted to the board of directors about two weeks after Mr. Maltby made his statement to the board. He could not say whether Mr. Chesbrough was there or not, but Mr. Chesbrough's uncontradicted testimony is that he was not there, and that this report was never brought to his attention. He was not then in Bay City.

The date in the corner of the report, "1-20-04," Mr. McGraw knew nothing about. It was probably made about December 15th, 1902 (Rec. p. 226). Mr. Chesbrough testified:

"I don't know that I knew he had gone out, or that he had made a report on the conditions he found; I don't believe I ever saw McGraw's report until—when Mr. Collins met me in Chicago and I spent that day with him. I think he (Collins) told me he was ascertaining how much and how big the contracts were with the railroads, and when they were receiving ties, and where; I don't know as to whether he mentioned what the companies owed Maltby. He met me on State Street, not by appointment. I did not know he was in Chicago." (Rec. p. 260.)

The McGraw report was not in existence then.

On page 30 plaintiff refers to "interviews with Mr. Collins at Chicago during the winter of 1902-1903," when the record shows that they only met once, and that was at the time Mr. Collins was investigating the Maltby accounts with the railway companies.

Point XVII.

Twenty-first Assignment (Rec. p. 433) is based on Judge Tuttle's charge to the jury (Rec. p. 378), which the Court of Appeals upheld in part.

The Court charged the jury (Rec. p. 380, 3d paragraph) that "it was claimed that all of these violations of the statute in the payment of dividends was a part of a general design on the part of the defendants to deceive the public," etc.

On page 384, 32d, the Court said to the jury :

"It is not necessary for the plaintiff to prove any actual conscious design or intention on the part of the defendants to mislead or deceive the plaintiff."

There is absolutely no proof in the record of any general design on the part of the defendants to do any such thing, while there is affirmative proof that they, in common with all the other directors, acted together in what they thought was the best interests of the bank.

This is the unquestioned proof with reference to the two defendants, and proof of a similar kind on the part of the other directors was excluded by the Court and is argued under other assignments.

The Court also charged the jury (Rec. p. 380, par. 4) :

"In addition to the tenth count of the plaintiff's declaration, which is referred to, there are the first, second, fourth and fifth counts, which rely respectively on the reports of February 6, April 9, September 9, and November 17th, 1903, and treat each purchase of stock by the plaintiff as a separate cause of action resulting from the publication of the preceding report. These counts, therefore, enable you to consider each report and each purchase by itself, if you think they should be so considered. Plaintiff does not claim, and is not required to prove, that the defendants actually signed their names on the copies of the report which were sent to the printer, or that defendant, Chesbrough, signed all of the reports, or that his name was printed on all of them."

These were the matters complained of in plaintiff's declaration; not failure to charge off paper. That was an afterthought.

The Court charged the jury, referring to the cross-examination of plaintiff, with reference to his inquiries before buying stock (Rec. p. 386, 3rd paragraph) :

"If he relied upon the published reports, it makes no difference whether he did or did not make additional investigation. His negligence, if any, is not a defense in an action of this kind. And defendants, if they knowingly permitted the publication of a false report, can not complain because plaintiff had confidence in it and relied upon it."

This was an argument for plaintiff. It undertook to explain away the testimony about plaintiff wanting to buy the stock to get on the board of directors of the bank; the evidence about the projected consolidation of the bank with another bank; ignored the testimony of plaintiff's knowledge of this particular bank and the men in it, and the plan of plaintiff and others for controlling it, and practically told the jury to exclude from their minds all testimony regarding any inducement of fact aside from the reports which led plaintiff to buy the stock.

The Court also charged the jury as follows (Rec. p. 386, 4th paragraph) :

"It is not necessary for plaintiff to show that defendants actually derived any benefit from the claimed violation of the statute. Plaintiff's right to recover, if any, depends upon his loss, not upon their gain."

As plaintiff had made a loss this was equivalent to telling the jury to find in his favor.

He charged also :

"You are not concerned in this case with what Mr. Andrews knew or believed, or what any of the

directors knew or believed, except the defendants themselves."

How then could the board of directors be blamed for not charging off paper which they believed to be good?

How could defendants be to blame in that respect if the board was not to blame?

The Court charged the jury as follows, referring to the reports of January 11th and May 29th, 1905, attested by plaintiff as a director:

"The mere fact that plaintiff signed the 1905 reports or either of them does not prevent his recovery, and does not excuse the defendants if they are otherwise liable."

No reference was made to the fact that plaintiff then knew that \$135,000 of Maltby paper, merged in paper made by Maltby Cedar Co., was about to be charged off (Rec. p. 48), and that \$88,000 of that paper remained in the bank, and was included in the loans and discounts in the next report plaintiff attested May 29th, 1905 (Rec. p. 38).

The Court of Appeals on two occasions thought this made a difference.

Woodworth testified—

"I signed the day after I was elected without any investigation" (Rec. p. 147).

The record shows that plaintiff did not rely on the reports. He knew "loans and discounts" contained all the paper the bank had "good, bad and indifferent." He tried to break the force of his previous testimony on the last trial by saying he "didn't answer correctly, or else didn't think far enough ahead."

He testified that he supposed the reports of 1903 were made up the same way as those in 1905, which he signed.

The Court erred in charging the jury, as follows: (Rec. p. 386; 7th Par.)

"Plaintiff was not compelled to sue all of the directors who signed the reports or who served during the years complained of, but he had a right to select the two defendants, and to sue them alone if he desired."

This charge totally ignored the law that one director, without special knowledge on his part different from all the others, or all the board must be to blame for not charging off paper, before one could be made a sole defendant.

Other directors, worth millions, whose acts were the same as Chesbrough's, were not sued.

Point XIII.

Twenty-second Assignment: Refusal to allow defendants' counsel to cross examine plaintiff under the Michigan Statute quoted in full above. Defendants' counsel was offering proof that directors of the First National Bank of Bay City wanted to get control of the Old Second National Bank, and offered to show Woodworth was in concert with them on cross examination of the witness Clift, and when objected to, the Court held it not proper to the direct examination (Rec. p. 137.)

That rule would not apply to the plaintiff, because under the Michigan Statute, plaintiff could be cross examined without making him his witness.

This statute in view of the amendment to Section 858, R. S. and the Judiciary Act which was in force January 1st, 1912, made competent plaintiff's testimony on cross examination for defendants.

Whether the testimony to be elicited was material, etc., could not be determined at once, but the Court excluded it, holding the Michigan statute did not apply in the United States Court.

The old statute, Revised Statutes, Section 858, was amended in 1906, United States Compiled Statutes, supplement 1909, page 242, to read as follows:

"The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States, shall be determined by the laws of the state or territory in which the court is held."

Section 858 as amended was re-enacted in the Judiciary Act of 1911, U. S. Comp. Stat. supp. 1911, page 271.

In the case of *McKnight vs. U. S. Sixth Circuit*, 126 Fed. 926, decided June 5th, 1903 (before the amendment) this court held that it was the general rule in the Federal Courts that a witness could not be cross examined upon any matter, except those referred to in his direct examination, following the case of *Wills vs. Russell*, 100 U. S. 621, in which it was held that that was the established rule of practice in the Federal Courts, etc.

This rule was followed by the Court of Appeals in the case of *Hales vs. M. C. R. R.*, 200 Fed. on page 538 (decided November 7th, 1912), in which the Court said:

"The general rule of practice in the Federal Courts limiting cross examination to the matters embraced in the examination in chief, subject to certain well known exceptions, is settled, etc."

No reference is made to the amending statutes.

In the case of *Rowland vs. Bicsecker*, 185 Fed. 516, decided February 14th, 1911, it was held (on p. 517) that the

statute of the state governed as to the competency of witness under the amendment of 1906.

The same ruling was made by Judge Rellstab in relation to the statute of New Jersey in re *Hoffman*, 199 Fed. 448, on p. 450.

The Michigan Statute has been repeatedly sustained in the Supreme Court, notably in *Johnson vs. Union Carbide Co.*, 169 Mich. 659, and *National Coal Co. vs. Gas Coke Co.*, 168 Mich. on page 206, where the Court says:

"The right of the plaintiff to call the witness Kain under Act 307 Pub. Acts 1909 cannot be questioned."

Kain was an agent of defendant Gas Co.

Twenty-third Assignment is covered by and argued with the Seventh (Rec. pp. 435, 426.)

Point XIV.

Twenty-fourth Assignment (Rec. p. 435): This is based on the trial court receiving evidence of the disposition, sale and management of the Maltby securities, and the consequent loss to the bank after Nov. 17, 1903, as a "history of the transaction."

It is necessarily connected with the Twentieth Assignment.

Twenty-fifth Assignment. This is based on the ruling excluding the evidence of Edgar B. Foss as to the honesty and competency of the officers and employes of the bank in 1902 and 1903. (Rec. pp. 350, 351.)

Point X.

Twenty-sixth Assignment (Rec. p. 436). Daily statement from bank books on days dividends were paid. There was no question about the correctness of the books but they did not bind defendant Chesbrough, nor was he responsible for ordering the dividends. The fact they were paid in good faith and on advice of counsel is not disputed. See *Witter vs. Sowles*, ubi supra.

Point XVIII.

Twenty-seventh Assignment (Rec. p. 436): This relates to sales of bank stock by defendants Chesbrough and also McGraw. It has already been stated when, how, and why defendant Chesbrough sold \$5,700 portion of his bank stock May 6, 1902. He was about leaving the city, he sold other stocks at the same time as he had a perfect right to do.

He might well have sold it for other reasons. Owing the bank nothing, keeping his account and the account of his firm there averaging fifteen thousand dollars Bump refused him a loan of fifty thousand dollars which he needed in building the Kennebec costing \$180,000. He might well say he "needed the money" and his uncontradicted testimony shows that his reasons for selling were both truthful and consistent.

McGraw sold his stock because the Woodworth-First National pool was buying the stock of the Second National Bank, and Mr. Woodworth himself had gone to Mr. Lamont, who died prior to Nov. 17, 1903, to get his proxy to vote against Mr. McGraw for director of the bank.

Matthew Lamont was conceded to be a thoroughly honest and reliable man, and he told Mr. McGraw that Mr.

Woodworth had tried to get his proxy. Charles A. Eddy, a business partner of Selwyn Eddy, W. L. Clements, and A. E. Bousfield, all directors of the First National Bank, were buying stock of the Second National about this time, the plan being to consolidate the two banks. (Clift, Rec. pp. 136, 137; McGraw, 195).

Mr. McGraw's uncontradicted testimony was (Rec. p. 196):

"I wish to say that I have no knowledge Woodworth got Lamont's proxy. I know he didn't, because Lamont himself told me he did not give it to him."

Defendant's counsel, on re-direct examination asked Mr. McGraw:

Q. Now speaking of this effort to push you from the board, did you learn anything in regard to that matter from Mr. Matthew Lamont? He died prior to November 17th, 1903. What information did you receive from him?" (Rec. p. 195).

This question was objected to as immaterial, and the Court permitted the testimony.

The information obtained from Mr. Lamont was (Rec. p. 195) near bottom; he said:

"I notice there is a disposition to remove you from the board, and that Mr. Woodworth has solicited my proxy. I cannot recall anything more he said."

On the subject of opposition to Mr. McGraw, see record, pages 189, 190.

Twenty-eight Assignment, (Rec. p. 460): The bank had previously made a loss on Maltby which plaintiff knew before he bought any stock, but he afterward made

a settlement with Bump for the indebtedness for which he was only indirectly liable.

The fact that Maltby or Maltby Lumber Co. had a commercial rating was entirely immaterial in the way his business was done, the bank having title to the commodity and the indebtedness for it.

Exhibits 29 to 39 inclusive above referred to were letters from and to Andrews, never known in any way to defendant Chesbrough, did not bind him and were inadmissible against him. They all related to the Maltby accounts and balances.

Maltby's discharge in bankruptcy cleared him of all his old indebtedness, and, if material at all, was in his favor.

The letters to the bank accepting the assignments of amounts due for the Maltby shipments to different railway and other sound companies, were proper evidence and the statement of plaintiff's counsel was prejudicial, duly objected to and the Court said nothing (Rec. p. 406).

Andrews was not permitted to answer the question as to whether the bank lost any money because the drafts were not forwarded for acceptance. It was objected to as "calling for a conclusion" and excluded (Rec. pp. 229, 231, 407).

Defendant Chesbrough was asked, on cross examination:

"Now, as a matter of fact, you did know that the drafts were not forwarded for acceptance, did you not?"

This was objected to as incompetent, and overruled, and the witness said,—“I guess that is right, I did know.”

That is, he knew the drafts were not forwarded for acceptance to the railway companies, etc.

Contrast this ruling with that excluding the testimony of the witness Andrews whether the bank had lost a dollar by reason of the drafts not being forwarded for acceptance.

This made a wrong impression upon the minds of the jury by allowing plaintiff to prove that the drafts were not forwarded, which was probably contrary to their ideas and experience than the ordinary and lesser transactions of life, and yet defendant was not permitted to show that that fact was not the cause of any loss to the bank. This was not a conclusion, but a fact.

Defendant Chesbrough was asked, on cross examination (Rec. p. 286), referring to a bill of lading to the Chicago, Milwaukee & St. Paul Railway Company—

“Q. And you knew when these wood products arrived at their destination they would be taken away by the C. M. & St. Paul Railway Company, did you not?”

This was objected to as incompetent, as the paper, a bill of lading, spoke for itself. Mr. Chesbrough was not in Bay City at the time, and there was no evidence that he knew anything about this particular paper. It was introduced for the purpose of showing the condition in which that paper was then.

The objection was overruled, and the witness answered—
“Presumably, yes, sir.”

That company, as is conceded in the record, would not accept drafts and it was reasonably safe to sell to. Woodworth as cross plaintiff in error seeks to reverse the decision of the Court of Appeals as to that portion of the

judgment which he has voluntarily remitted, because it is claimed that the Court erred as to the measure of damages.

Point XVIII.

The first judgment of plaintiff was reversed because, among other things, an improper measure of damages was adopted and his second judgment suffered by a similar mistake.

Upon this subject the Court charged the jury (Rec. p. 387, last Par.) :

"If you find that plaintiff is correct in these claims and in the amount claimed, the measure of his damages would be as follows: For his first purchase, which was a purchase of 20 shares, or one per cent. of the capital stock of the bank, his damages would be one per cent. of the \$200,000.00 or \$2,000.00, with interest from March 14th, 1903, to the date of your verdict, at five per cent., which is claimed to be \$975.56, making a total claim for his first purchase of \$2,975.56. For his second purchase, which was a purchase of 25 shares, or $1\frac{1}{4}$ per cent. of the capital stock of the bank, he would be entitled to recover $1\frac{1}{4}$ per cent. of \$200,000.00 or \$2,500.00, together with interest at five per cent. from May 26th, 1903, to the date of your verdict, which is claimed to be \$1,194.45, making a total claim for the second purchase of \$3,694.45. For the third purchase, which was a purchase of 30 shares, or $1\frac{1}{2}$ per cent. of the capital stock of the bank, he would be entitled to recover $1\frac{1}{2}$ per cent. of \$200,000.00 or \$3,000.00, together with interest at five per cent. from September 16th, 1903, which is claimed to be the sum of \$1,387.50, making a total

claim for the third purchase of \$4,387.50. For the fourth purchase, which was a purchase of eighty shares, or four per cent. of the capital stock of the bank, his damages would be four per cent. of \$200,000.00 or \$8,000.00, with interest at five per cent. from December 16th, 1903, which is claimed to amount to \$3,600.00, making a claimed total for the fourth purchase of \$11,600.00. The total sum so claimed would, therefore, be as follows: For the first purchase with interest, \$2,975.56; for the second purchase with interest, \$3,694.45; for the third purchase with interest, \$4,387.50; for the fourth purchase with interest, \$11,600.00; making the total amount with interest, \$22,657.51."

The verdict was \$22,662.98, just \$5.17 more. Interest for one day at 5 per cent. would be only \$3.15 and the verdict was rendered the same day.

The Court and jury ignored the undisputed facts that plaintiff sold to Andrews 2½ shares of the reduced stock for \$375, on March 23, 1905 (Rec. p. 371.)

There was no evidence of the value of the stock at the time of plaintiff's different purchases. It was assumed that as plaintiff paid certain sums for the stock and more than a year after the last purchase of stock, after the loss on the Maltby paper was determined in some measure and seven or eight years afterward it was called \$200,000.00, therefore the measure of damages was the per cent. of that loss represented by the per cent. of the stock held by plaintiff.

The plaintiff did not offer to rescind his bargain. He knew when the stock was transferred to him in the bank whose stock it was, and that it was not defendant Cheshbrough's. He kept the stock, and in this suit he asked and the jury was directed practically to give him the difference

between what he paid for the stock and what his expert witness, Clark, figured the stock was worth at about the time of purchase—and defendants were not allowed to show the proper considerations in measuring damages. Though the price of the stock fell after his first purchase he kept on buying it, as he says “because he wanted the stock.” He paid the lowest price in Dec., 1903.

This ruling ignored many elements of value, such as good will of a going concern long established in the community, etc.

Plaintiff sold $2\frac{1}{2}$ shares of his stock to Andrews at \$150 a share, March 23rd, 1905, to qualify him for election as director (Rec. p. 371). At this place plaintiff calls it $2\frac{1}{2}$ shares because of the reduction. It represented five of the shares he bought, which according to that sale were worth at least \$75 each. These five shares, though sold by plaintiff, are still considered his in computing damages and interest.

Plaintiff's counsel tried to explain away this important fact on page 372 of the record, by a leading incompetent question:

“The transaction was not an immediate purchase and sale of the stock, but was a device to carry out the object of qualifying you to serve on the board of directors, was it not?”

Objected to, etc., overruled, exception.

“A. It was an actual sale.”

Defendants' question as to the effect on the value of stock of this litigation commenced in the State Court August 1, 1905, was ruled out (Rec. p. 369; 169).

The witness, Andrews, was asked whether he and Mr. Woodworth ever had anything to say with reference to the effect on the bank of this litigation.

This was objected to by plaintiff's counsel, because they claimed nothing for depreciation of the stock on that account, which objection was sustained, and the testimony was excluded.

The plaintiff was asked, on cross examination, whether from 1905, when he resigned from the board of directors, and since he commenced the litigation in behalf of himself and relatives, which litigation has been pending in one form or another until this time, that had not depreciated the value of the stock very much.

On plaintiff's objection both these questions were excluded, and defendants were not permitted to show the fact.

It may be claimed that prior to this time a large amount of the Malthy loss had been definitely ascertained, but it is well known that in banking, as any other business, a loss in one matter may be made good by the gain in another, and the defendants should have been permitted to have these questions answered.

Defendants offered to show by Cashier Andrews the value of the stock at the time of the trial, and it was excluded.

"The value of stock in the bank which is a going concern is less than the book value of the stock, for an allowance is always made for bad debts." Andrews (Rec. p. 169), near bottom of page.

Woodworth sold his stock in this bank in October, 1911, at \$105 a share (Rec. p. 368). This was after the reduction of the capital stock to \$100,000.

That such a measure of damages is erroneous has been held in several recent cases, among which is *Pittsburg Life*

and Trust Co. vs. Northern Central Life Insurance Co., 140 Fed. Rep., 888, in which the court holds that in an action for deceit in making false representations with respect to property sold, the amount recoverable, if the deceit is proved, is not the difference between the price paid and the value of the property if it had been as represented, but the actual loss to plaintiff, which is measured by the difference between the actual value and the price he was induced to pay. Affirmed in Court of Appeals 148 Fed. 674. The leading cases on this subject are *Smith vs. Bolles*, 132 U. S., 125, and *Sigafus vs. Porter*, 179 U. S., 116. In *Smith vs. Bolles*, 132 U. S., 125, 10 Sup. Ct. Rep. 39, 33 L. Ed. 279, which was an action for deceit in the sale of certain mining shares, the jury was instructed that the measure of damages was the difference between the contract price and the value of the stock, if it had been what it was represented to be. In holding this to be error, it was said by Fuller, C. J.:

“What the plaintiff might have gained is not the question, but what he lost by being deceived into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations. * * * If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon then the defendant was liable to respond in such damage as naturally and approximately resulted from the fraud. He was bound to make good the loss sustained, such as the moneys plaintiff had paid out and interest, and any other outlay legitimately attributed to defendant's fraudulent conduct; but this liability

did not include the expected fruits of an unrealized speculation. The reasonable market value, if the property had been as represented, afforded therefore, no proper element of recovery."

Sigafus vs. Porter, 179 U. S. 116, 21 Sup. Ct. Rep. 34, 45 L. Ed. 113, was also an action for deceit in the sale of a gold mine. It was claimed that if the property had been as represented, it would have been worth \$1,000,000, whereas, as it was, it was practically worthless. And the jury were again instructed that this was the measure of damages. But this was reversed.

"There are judged cases," says Mr. Justice Harlan, "holding to the broad doctrine that in an action for deceit, based upon the fraudulent representations of a defendant as to the property sold by him, the plaintiff is entitled to recover, by way of damages, not simply the difference between its real actual value at the time of purchase, and the amount paid for it by the seller, but the difference, however great, between such actual value and the value (in excess of what was paid), at which the property could have been fairly valued if the seller's representations concerning it had been true. So, in the present case (taking it to be as set out in the plaintiff's pleadings), although the defendant agreed to take, and the plaintiff agreed to pay \$400,000 for the property in question, the latter—according to some cases, interpreting literally the words used in them—could retain the property and recover by way of damages the difference between its real value at the date of purchase and the sum of \$1,000,000, which the plaintiff alleged it would have been worth at that time if the representations of the defendant concerning it had been true. We

held in *Smith vs. Bolles* that such was not the proper measure of damages, that case being like this, in that the plaintiff sought damages covering alleged losses of a speculative character. We adhere to the doctrine of *Smith vs. Bolles*."

The rule laid down by Sanborn, J., in *Rockefeller vs. Merritt*, 40 U. S. App. 666, 76 Fed. Rep. 909, 22 C. C. A. 608, was also quoted with approval where he says:

"The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property, is the difference between the actual value of that which is parted with, and the actual value of that which he received under the contract. It is the loss, which he sustained, and not the profits which he might have made by the transaction. It excludes all speculation, and it is limited to compensation."

So in *High vs. Berret*, 148 Pa. 261, 23 Atl. Rep. 104, the plaintiff having been induced to purchase 50 shares of stock of the par value of \$100, in a mining company, organized to buy out another, brought an action of deceit, on the ground that false and fraudulent representations had been made as to the success of the old company, and the amount of ore in the mine; and he was allowed to testify at the trial that, if the representations had been true, the stock would have been worth \$150 a share. In criticising this it is said by Williams, J:

"His (plaintiff's) damages should equal the loss which the deceit, which the jury have found was practiced upon him, inflicted. The loss, in the transaction before us, is the difference between the real value of the stock at the time of the sale, and the fictitious value at which the buyer was induced to

purchase. * * * His actual loss does not include the extravagant dreams which proved illusory but the money he has parted with, without receiving an equivalent therefor."

In the 140 Fed. cited above the Court said on page 893, ~~140 Fed.~~ last paragraph:

"It is established by a bead roll of authorities, to which there is no substantial dissent, that where a prospective purchaser undertakes to make and does make an investigation of his own and the vendor does nothing to prevent it from being as full as it is desired, the purchaser can not be afterwards heard to say that the vendor made representations which he relied upon to his hurt."

Affirmed, 148 Fed., 674.

Woodworth testified that after reading the report of February 6th he went to Andrews, asked for and obtained a statement from the books of the bank, to see whether there was any material difference (Rec. p. 35).

CASES CITED FOR PLAINTIFF.

Allen vs. Luke, 163 Fed. 1018, relied on by plaintiff, was not the case of an individual stockholder or purchaser of stock, but the statutory agent of the bank who had succeeded the receiver, and the suit was in behalf of all the stockholders of the bank, the creditors having been paid in full.

Morgan vs. Skiddy, 62 N. Y. 319, was a case where some of the directors in a Colorado mining corporation were held liable for false statements in a prospectus, which they knew to be false, having deliberately given a wrong description of the situation of a mining camp in Colorado. Only

those actually guilty of making false statements of fact were ever put on their defense. The demurrer was sustained as to the other directors (*Ib.* 328.)

Hubbard vs. Wearc, 79 Iowa 678; 44 N. W. 915, was a common law action for deceit practiced by means of false statements personally made by the defendant in the action.

In *Prewitt vs. Trimble*, 92 Ky. 176; S. C. 17 S. W. 356, the president of the bank, to sell *his own stock*, made false statements. It was a common law action involving actual fraud and was limited by

Foster vs. Gibson, 38 S. W., 144, S. C.

Heard vs. Pictorial Press, 182 Mass. 530; 65 N. E., 901, was an action founded on a special statute of that state. A false certificate filed with the Secretary of State for the purpose for which it was used was the means employed to effect the fraud.

The case of *Prescott vs. Haughey*, 65 Fed. 653, same case 152 Ind., 317, was a case where a verdict was directed for defendant, a motion for a new trial was denied, affirmed on appeal, and a re-hearing denied. The question which was in the case was simply on the right to remove the case, and the case was remanded to the State Court, and the result is stated above. It is therefore no authority in this case.

I do not overlook the reference to this case in the opinion of this court which is the only reference I find to it. 195 Fed. 880.

That case was held by District Judge Baker to involve no Federal question, being an action for deceit and procuring deposits for an insolvent bank, and was therefore remanded to the State Court, with the result above noted.

Cassidy vs. Uhlman, 170 N. Y. 505, was an action for fraud and deceit brought by depositors in Madison Square State Bank against the president and two directors, who were the managing committee in actual control of the bank, and knew it was insolvent, knew "the bank was busted," yet they kept it open. "A few favored depositors were taken care of" (Rec. p. 524). The judgment was affirmed by four judges against three. It is again referred to herein.

This case was reversed (27 App. Div., 80), when first before the New York Court of Appeals, 163 N. Y. 380, because Uhlman, as a witness, was not allowed to state his belief as to the condition of the Madison Square Bank, just before it was closed.

"The contention of the defendant (Uhlman), was that the result of an examination made by him showed that the bank had more than sufficient property to pay its depositors in full, and he marshalled such facts and circumstances as he could to support his contention that he was acting in good faith and without knowledge of the insolvency of the bank. This was one of the issues, indeed the leading one, and the defendant sought to put before the jury his belief touching the responsibility of the bank up to Tuesday night, August 8th, his claim being that his belief constituted an important element which the jury should weigh, pp. 381-2.

* * * *

"It is, of course, the general rule that the operation of the mind of a witness may not be given, but there are exceptions to the rule and among them is a case where the character of the act depends on the intent with which the act is done, or, in other words, upon the operation of the doer's mind, and

in such case his belief touching certain conditions which should influence him is material. A party's testimony as to his belief may have much or little value with the jury, but he is always entitled to have it considered where, as in this case, his liability is predicated upon the claim that with knowledge of the truth he suppressed it under circumstances calling upon him to speak with the result of injury to another. If it were a fact that, after having made such an investigation of the affairs of the bank as a reasonable and prudent man would make under the circumstances with which he was surrounded, he believed as a result thereof that the bank was solvent, then, the action should not have gone against him for he acted justly and properly according to his belief, and therefore, not fraudulently. But the plaintiff says that there was abundant evidence from which the jury could find that his knowledge was such that he could not, and did not, entertain any such belief. That may well be so, but the fact remains that his belief was a fact of the first importance in the case, and he was entitled to testify as to what it was, not because his testimony would be controlling, for it would not, but because he was entitled to have it weighed by the jury with the other testimony in determining what the fact was." Pp. 383-4.

Cassidy vs. Uhlman was again before the Court of Appeals, 170 N. Y. 505. It was an action by a depositor, for himself and as assignee for several others, for fraud and deceit in keeping the Madison Square State Bank open and in receiving deposits when defendants Uhlman, Blant and McDonald had absolute knowledge that the bank was insolvent (Rec. p. 517).

Blant, as president, and McDonald and Uhlman, directors, as a committee, had the charge, management, direction and actual control of the bank.

Favored depositors, one of the defendants as an officer of a corporation, and the other defendant's brother, were given the cash on hand.

Cassidy vs. Uhlman, 54 App. Div., 205.

The decision affirming judgment for plaintiff was by four judges against three who rendered a strong dissenting opinion. 170 N. Y., pp. 526-41.

The case of *Hindman vs. Bank*, 112 Fed., 831, was a case where a cashier of a bank had falsely certified to the State Insurance Commissioner that a certain deposit was made with him by an insurance company, which was not true. The Court of Appeals of this circuit held that to sustain an action for fraud and deceit, based on false representations by defendant by which plaintiff was induced to purchase property, it must be shown (1st) that the representation was false, (2d) that the person making it knew it to be false, etc.

The case was won by defendant, but reversed in this court on the error of the trial court as to the measure of damages.

A petition for certiorari to the Supreme Court was denied (186 U. S., 483) and the case was not tried again.

In that case the cashier certified falsely as to a question of fact. He knew it was false when he made it.

The bank was held responsible for his action.

The stock purchased was worthless (see p. 394). It was not a case where directors were acting in good faith, on a matter of judgment as to value of loans and discounts and sufficiency of securities.

Under the case of *Taylor vs. Thomas*, cited by plaintiff on the trial, the case could not have been maintained against less than three directors, being the number required by law to attest the report, and it was against the three who actually attested it.

That case was a common law action for deceit, was against the three attesting directors, Cassius B. Thomas, William D. Eddy and Edgar D. Starbuck.

The allegation was that the comptroller required a report and that the cashier made and verified the report.

"The correctness of said report was attested by the defendants herein, who were as aforesaid at said time directors of said Citizens' National Bank, three of which directors were required by law to attest said report," etc.

Taylor vs. Thomas, 106 N. Y. Sup. 538.

On appeal the judgment of \$4,800 for plaintiff was reversed on law and facts, and a new trial granted with costs unless \$2,000 and interest was deducted. S. C. 124 App. Div. 53.

This case was affirmed in the Court of Appeals June 1st, 1909, on opinion of Judge Cochran of the App. Div., 195 N. Y., 590.

Davis vs. Louisville Trust Co., 181 Fed. 10, which was cited by the Court of Appeals in this case, as analogous to the case at bar, was a case where the Howe Manufacturing Company wanted to sell its stock, and the president of the company made a statement to R. G. Dun & Company's mercantile agency which this Court held admissible in evidence, and which was known to Davis by Chess, who obtained it for him. That report showed:

1. "That \$250,000.00 in cash was actually paid in."

This was not true. Ib. 15, p. 21.

2. "Half the authorized stock had been subscribed."

This was not true. Ib. 15, p. 20.

3. "The company had purchased a wholesale steamfitting and supply business for \$150,000.00."

This was equally untrue. Page 21.

The person making these statements knew, and must have known, that they were untrue. No question of judgment, belief or opinion was involved.

They were not verified by the oath of anyone. They were not required by law, nor were they required to be made in a particular form, and at a particular time, as the reports in this case were.

The reports in question here were that the bank had on the day fixed by the comptroller, and mentioned in the report, loans and discounts to the amount stated in the report, which report the cashier of the bank, who would be reasonably supposed to know more about the matters than anyone else, and whose honesty and integrity is unquestioned and conceded, had verified as true by his oath before either defendant attested them.

The case was then appealed to the Supreme Court of the United States, and as modified by the Court of Appeals of New York was affirmed. 224 U. S., 73.

The Supreme Court held, on page 84: "The courts of New York have decided that the requirements of the local law of deceit are identical with what we have decided on the requirements of the National Banking Act."

In that case the three directors who attested the report complained of, and who made direct representation to the

purchaser of the stock as to its value, were sued in an action for deceit.

In that case, the comptroller of the currency had written to the directors before the report was made, stating that certain items "must be regarded as doubtful assets and that immediate steps should be taken to collect them or remove them out of the bank."

Out of the amount of paper thus criticized by the comptroller, \$194,107.02, there was collected \$97,000.00.

Boyd vs. Schneider, 131 Fed. 223, was a case in equity by a depositor in a National Bank which had failed, in behalf of himself and others similarly situated, who might join, etc., against the directors of the bank, after the receiver of the bank and the comptroller had refused to bring suit against directors for their negligence and misconduct.

It was totally unlike this case.

It is therefore respectfully submitted:

1. That the judgment of the United States Court of Appeals, Sixth Circuit, should be reversed and the case remanded to the district court with direction to dismiss the action for want of jurisdiction in that court; or

2. That the judgment against defendant Chesbrough be reversed and a new trial granted, and the order in his favor for the remittitur of \$7,708.56, complied with voluntarily by plaintiff, be affirmed.

Thomas A. E. Nease.....

*Attorney for Frank P. Chesbrough,
Plaintiff in Error and Cross-
Defendant in Error.*

FILED

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JAMES D. MAHER
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**Supreme Court of the
United States**
October Term, 1916.

FRANK P. CHESBROUGH,
Plaintiff in Error,
vs.
FRANK T. WOODWORTH

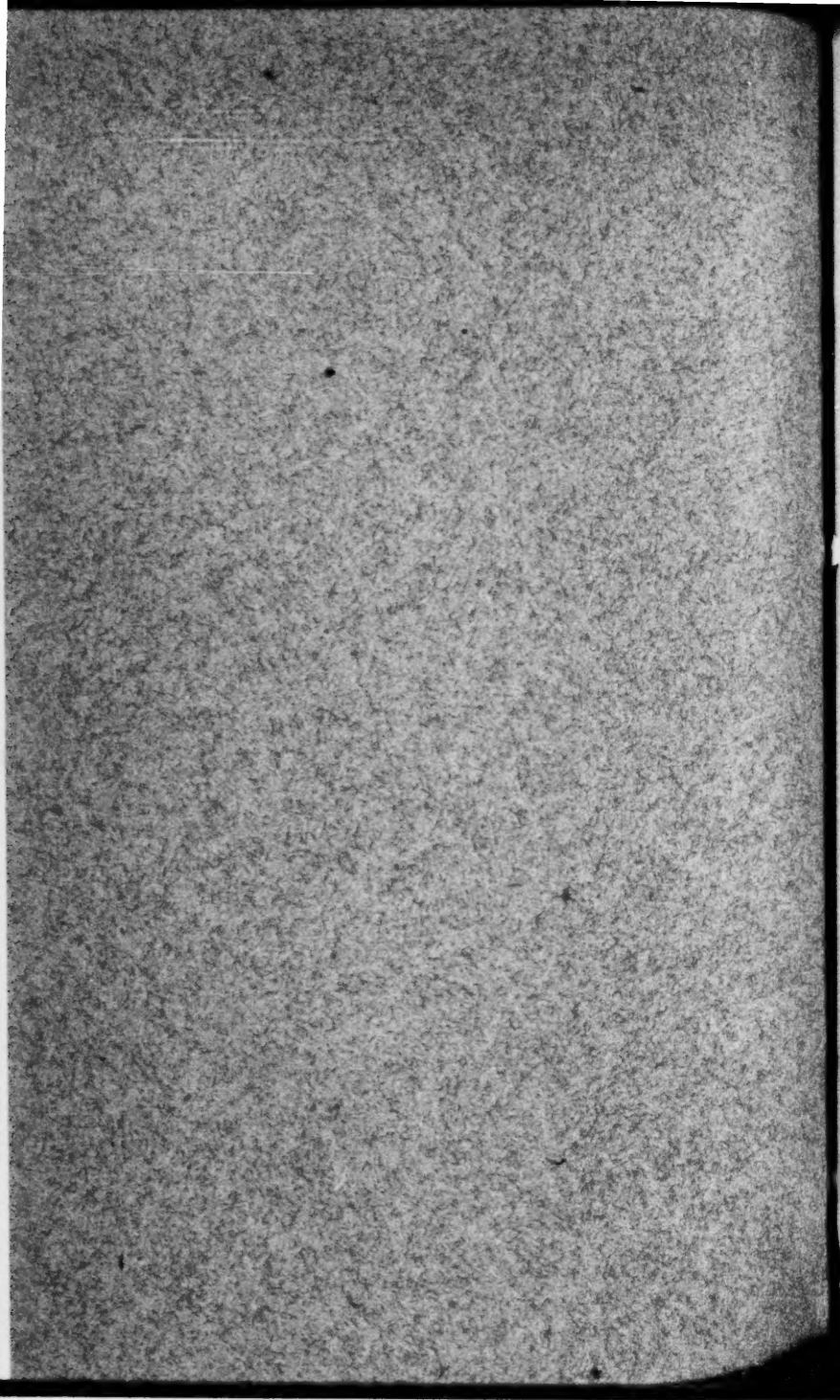
No. 179.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT.

**BRIEF IN REPLY FOR FRANK P.
CHESBROUGH, PLAINTIFF IN ERROR.**

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1917



Supreme Court of the United States

FRANK P. CHESBROUGH,
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vs.
FRANK T. WOODWORTH.

October Term, 1916.
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(24819)

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CORRECTION OF ERRORS IN REPLY BRIEF FOR DEFENDANT IN ERROR, WOODWORTH.

The commencement of the "litigation" was properly stated in my former brief, p. 1, and was not confined to this case.

Whether the *Smalley case* there cited was a test one is not in this record, and was improperly referred to as such in the reply brief.

The law in this sort of a case was established by this court in *Briggs vs. Spaulding*, 141 U. S., long before this litigation was begun.

The marginal figures are pages of reply brief:

Page 2, 2nd par. It was correctly stated on page two of defendant's brief that only "affirmative action of de-

endants" was complained of, as will be seen by plaintiff's declaration, which alleges that it was defendant's duty not to "knowingly violate Sec. 5239 R. S." etc., yet "defendant Chesbrough disregarding his said duty, then and there knowingly violated and knowingly permitted, and assented to the violation of the provisions of the Act of Congress aforesaid, by permitting and assenting to the publication of said report." (Feb. 6, 1903.) Rec. 2.

The same allegation occurs in each of the counts relating to the reports. Rec. 4, 7, 9, 12. Chesbrough's brief page 36; and the same allegation is made as the counts relating to dividends. Rec. 15, 16.

Page 3. It was not stated in my brief, p. 6, that the Maltby and Brotherton paper was charged off in 1906. The capital of the bank was reduced in 1906. Rec. 197.

Page 4. There is no evidence in the record that defendant Chesbrough had anything to do with the sale of his brother, Aaron Chesbrough's stock; that stock was placed with broker Clift by McGraw, R. 135, and Clift sold some of it May 25, 1903, to Woodworth; the remainder was sold May 26 and 29 to others. Rec. 143. There is no evidence in the record that defendant Chesbrough was trying to hold up the price of the stock for either his brother, himself, or his friends. The portion of his own stock which he sold, was sold in May, 1902, nearly nine months before the first report complained of, Feb. 6, 1903, was made.

Page 4. If Maltby profits were "paper profits," why was it not proven so by plaintiff? He had several years within which to secure such testimony if it existed.

Maltby's selling price for his products was fixed by contracts with responsible parties, and did not depend on the open market.

Page 5. If Lewis could not verify the Maltby inventory, it simply shows his incompetency for the work he was doing. It makes no difference how many men make an inventory; when property is described, and the location given, its existence, value and condition can be ascertained.

Page 9. Mr. Clark endeavors by taking the testimony that Woodworth gave the third time he was examined as a witness rather than the first time he was examined, with reference to the meaning of loans and discounts, to show that he thought all the paper held by the bank was good, and would be paid.

When he testified in the *Smalley case*, in the State Court at Saginaw, he said he knew that loans and discounts meant "all the paper the bank had, good, bad and indifferent," and he explained what he meant by "indifferent." Rec. 44, 46.

The exact testimony was:

"Q. What does loans and discounts mean?

A. That means paper that the bank discounted.

Q. What do you mean by that? The drafts and promissory notes, and all obligations that the bank has?

A. Yes, practically.

Q. You knew that included good debts and bad debts?

A. It is supposed to include good debts.

Q. Sometimes bad debts?

A. If the paper turns out bad, yes. Rec. 46.

Q. After you were out of the bank, and were in business for yourself, did you know of any bad paper?

A. Yes, I knew the bank had some bad paper.

Q. They had bad paper from time to time all the while, didn't they, and every bank does?

A. A small amount, yes.

Q. They (this bank) made a loss by your very firm, didn't they?

A. A small one.

Q. You mean to say with loans and discounts of \$1,081,446.05, you thought that was all good?

A. Practically good.

Q. What do you mean by that?

A. I mean there might be a small shrinkage, but if they were carrying a large discount. Rec. 46.

Q. Loans and discounts include the money the bank had, you knew that?

A. No, the bank had cash.

Q. I say all the paper that the bank has, all the obligations that the bank owns, are loans and discounts?

A. Yes, I think so.

Q. That includes them all, good, bad and indifferent?

A. I don't know; they carried some suspended bills.

Q. Is it in the loans and discount accounts?

A. No, it is in the suspended account, isn't it?

Q. You knew all that; didn't you? You can say you know or didn't know?

A. Well, I don't know about that.

Q. You mean to say that loans and discounts don't include all the paper that the bank has?

A. It includes all the paper.

Q. Good or bad?

A. Until it is charged off to profit and loss.

Q. Then, don't it stand as loans and discounts?

A. Not when it is charged off.

Q. But it is still loans and discounts, but it isn't figured in the loans and discounts after it is charged off? That is what you mean?

A. Yes.

Q. So that you knew that the item of loans and discounts included all the paper that the bank had in what is called 'live paper,' whatever its value might be?

A. Whatever is carried in the loan and discount account.

Q. Whatever it was, good or bad, as the case might be?

A. Yes." Rec. 43.

In Woodworth's testimony on the trial in question, he said Rec. 39:

"I testified in the Saginaw Circuit Court that I knew that that amount, which is the amount of loans and discounts, regardless of their value, represented the loans and discounts, regardless of their value, and that I knew that that statement in any report must list the amount of loans and discounts held by the bank on that day, regardless of their value, but if I did so testify, it was a mistake, and I didn't answer correctly, or else did not think far enough ahead."

Page 9. No fair inference that plaintiff lived in D. C. Smalley's family at the time of the occurrences in question can be drawn from page 26 of my brief, and the very next paragraph to the one referred to, showed that plaintiff married a daughter of James S. Smalley, and lived with him at the time.

Plaintiff testified, Rec. 36:

"I knew of the Mosher failure in 1895, and knew that the Second National Bank lost a considerable amount of money in that failure, and had to cut their stock from \$400,000.00 to \$200,000.00."

On page 10 of Mr. Clark's brief, and in different places throughout the brief, in referring to brief for Chesbrough, he uses the words: "untrue," "unfair," "incorrect," "misleading," "misconstrue," "delusion," "frivolous," "absurd," "absurdity," etc. This is merely his way of arguing a case.

Page 13. In a trial before a jury, there is no such thing as excluding certain evidence as a substantive cause of action and permitting the same evidence to remain for another purpose. If evidence is in at all, the jury considers it for all purposes.

Page 13. There is not a word in plaintiff's declaration about not charging off paper.

The Court of Appeals in its first opinion said: "The underlying wrong, if any, was in not charging off paper," and on the second trial, plaintiff's effort was to show that the paper should have been "charged off," and this is neither a "misconstruction" or "delusion."

Two directors could not charge off any paper, and in order to make one director liable, it should be shown by proof, that it was the duty of the board of which he was one, to charge off the paper, and it was not done, or that the one director alone had knowledge that the paper should be charged off, which he did not give to the board.

The other directors were not permitted on the trial to state Davidson, Rec. 234; Foss, Rec. 351; charge to jury, Rec. 386, 6th par.: "You are not concerned in this case with what Mr. Andrews knew or believed or what any of the directors knew or believed, except the defendants themselves."

Mr. Clark himself states at the bottom of page 13 of his reply brief: "that defendants knowingly violated, and knowingly permitted and assented to the violation of the

statute *by* assenting, permitting, and attesting to the publication of a false report." Not a word about charging off paper.

Page 14. If it were plaintiff's theory that the defendant's signature to a report was immaterial, why did he base his whole cause of action on the particular reports that were signed by one or the other, or both of the defendants?

It is an unwarranted assumption, in the reply brief, that the specification of errors in the brief for plaintiff in error was merely explanatory, and not relied on for reversal, for those are the errors which are relied on for reversal, and the specification of errors is such as is required by the rule of this court.

The case of *Oliver vs. Perkins* cited by plaintiff was an action on the case for damages, caused by various wrongful acts in a manufacturing business, not based on a specific statute like this action.

Page 20. It is argued that there is no resemblance between this case and that of *Briggs vs. Spaulding*, because that was a case brought in behalf of the bank. That case was brought by the receiver of an insolvent bank to enforce the liability of directors under the National Banking Act. This case is brought under the same act.

Page 22. Counsel for Woodworth admits that a director is not charged with knowledge of what appears in the books and papers of the bank.

If what appeared in the books and papers of the bank is stricken out of this case, you will have no evidence whatever of anything that tended to establish any claim against defendant Chesbrough that occurred prior to November 17th, 1903, the date of the last report complained of. What occurred after that was incompetent and immaterial.

That was the main contention for defendant on the trial that the books and papers of the bank could not establish any liability against defendant, and the plaintiff was permitted to recover upon only the evidence of the books and the realization on the securities held by the bank, and the failure to pay, in full, which facts were determined long after November 17th, 1903.

Page 25. It was not the theory of defendant's counsel that "as each document (letter) was identified and offered by plaintiff, it was necessary to prove in advance by positive definite evidence that it was actually submitted to each of the defendants," etc. Defendants' counsel objected to the receipt of these letters, Exhibits 57 to 65 inclusive, because they were not authenticated, were hearsay, and there was no evidence that they were ever brought to the attention of defendant, etc., Rec. 85, and such evidence was not offered at any time.

The quotation, following this, from the testimony in reference to the reduction of the Maltby line under instructions from the comptroller, referred simply to the amount of the line, and that is out of the case.

Throughout the brief for plaintiff in error, it was alleged, with reference to different matters, that there was no evidence in the record, etc. It is now objected that this is not sustained by definite citations to the record.

Obviously it was the duty of the defendant in error, if there was such evidence in the record, to point it out by apt reference, and that has not been done.

Page 27. The board of directors acted as a unit in reference to all matters, including the Maltby Lumber Company account. They discussed it certainly, because it was a large account, and they all relied upon the assurance of

Mr. Bump, the president, and the best banker in Bay City, that it was good. There was no question at any time, except about the size of the account, and it was the size of the account that the comptroller objected to, which, as stated above, is now out of the case.

We have a reference on page 27 of the reply brief as to the supposed good reputation of some of the board of directors. The record shows that all the directors were men of high standing and reputation, and while it is argued here that defendant Chesbrough had all the knowledge that they had, they were not permitted to show their knowledge of or belief in the goodness of the Maltby paper, or the correctness of the reports at the time they were made.

Page 31. Plaintiff having based his declaration upon the theory that the accounts were false, because, as it turned out later there was a loss, contends now that it is a ground of liability that the reports were true, and corresponding with the books of the bank.

Both the defendants testified that they regarded the Maltby paper as good at the time the reports were made, and the other directors were not permitted to testify that they regarded the paper as good and secured.

In the case of *Jones National Bank vs. Yates*, No. 24240, in this court, the petition was filed by a depositor in the bank, being against all the directors, it was alleged that the duty of the board of directors was to see that all such papers as were worthless or were of little or no value were charged off from the assets of said bank, and not included in its statements. The bank at that time being insolvent.

In the *Jones National Bank cases*, all of the directors were sued, and they were complained of for not charging off worthless and past due paper. *Jones Record*, 2.

The same charge was made in the *Bank of Staplehurst vs. Yates, et al.* Staplehurst Record, 2.

The same charge was made in the *Utica Bank case*. Rec. 2.

The same appeared in the case of *Thomas Bailey vs. Yates, Louisa Hammer, et al.* Bailey Record, 2.

Page 33. The case of *Thomas vs. Taylor*, was an action for deceit against the directors who actually signed the report published, and who made personal statements to the plaintiff in that case for the purpose of inducing him to buy their stock.

The case of *Mason vs. Moore* was one where the report was untrue, because it did not agree with the books of the bank nor show the losses the bank had made, as shown by the books. No one was held liable in that case.

Page 34. It seems, according to the reply brief, that if the plaintiff testified one way the first time he was examined, which was nearest in point of time to the facts, and later shaped his testimony to meet exigencies as they arose, in successive trials, that it is the last testimony which should be accepted and not the first.

No paper was included in the reports, but that which was believed to be good when the reports were made.

Page 35. The stock in this bank had paid 5% semi-annual dividends for many years. This was undisputed.

Page 36. On this page, counsel claims that the effort to unseat McGraw "had its inception in 1904," and on page 37, he quotes McGraw's testimony, showing that it was in 1903. Rec. 189.

No claim was made that Woodworth tried to buy Lament's stock. He wanted his proxy. Rec. 195-6.

The fact that Andrews knew nothing about the First National Bank pool is entirely immaterial. It is not likely that he would know.

Pages 36-7. The effort to defeat McGraw's election as director of the bank was shown to be made in the "middle of the summer of 1903," three or four months before McGraw listed his stock with Clift. Rec. 195.

Page 39. 4th and 5th pars. Here the reply brief contradicts itself. What really occurred is shown on page 268 of the record.

Mr. Chesbrough being on the stand:

"Mr. Weadock: Q. At this time I desire to offer in evidence the statement of the dividends of this bank, found on page 406 of the printed record. It is agreed to by counsel.

The Court: Very well.

Mr. Weadock: There is one (portion) that comes within my objection.

Mr. Clark: We will put it in now.

The Court: I will permit the plaintiff to put it in at this time, so that it may be consecutive. You may have the exception.

Mr. T. A. E. Weadock: I will take the exception."

Page 40. Defendant does not contend that if all the board of directors were to blame, a separate suit might not be instituted against one under the statute, but he has always contended that for a breach of duty, which only a majority of the board could discharge, it must be charged and proved that the board knew what the duty was and knowing, disregarded it.

This is not a case of tort; it is a question of a statutory liability.

Page 43. It was stated in my brief, p. 152, that my quotation from *Cassidy vs. Uhlman*, 170 N. Y. was from the opinion of Judge Martin, "with whom Ch. J. Parker and Haight J. concurred." The fact that it was the minority opinion was plain.

Page 52. The U. S. Circuit Court of Appeals in its first opinion distinctly stated that the defendants' liability could not be estimated as of December 16th, 1903, the date of the last purchase of stock, because their latest act, which was constructively a representation of fact by them to plaintiff, was during the previous month. This referred to the report of November 17th, 1903.

The statement was not confined to the Brotherton paper, and it was not ambiguous.

Page 45. Chesbrough was only nominally a director of the Maltby Cedar Company; he had left Bay City, and could not give much attention to the matter, and he knew nothing about the cedar business, Woodworth, also, was a director of the Cedar Company.

Bad debts, as stated in my brief, p. 151, are defined by statute.

As to other debts not covered by the statute, if any, that is a matter of the judgment of the board whether and when they should be charged off.

There was nothing inconsistent in defendant's position, when he was careful to state in his motion to strike out evidence as to things happening after November 17th, 1903; that he excepted the two reports attested by Woodworth. This was done out of abundance of caution, so that no contention could be made by any one that defendant's counsel had waived the point.

Page 59. The Court of Appeals in its opinion, 195 Fed. 883, said that plaintiff was entitled to show if he could

that after defendants knew the Maltby loan was doubtful, they sold at a high price most of the bank's stock owned by themselves and their relatives, etc.

Defendant Chesbrough had nothing to do with the sale of any of the stock which belonged to his brother Aaron. The reference in the quotation was intended to refer to defendant McGraw, who sold three of his wife's five shares, Rec. 142, 213, and his sister, Mrs. Jennie McGraw Curtiss, who sold her stock, because McGraw was going to be dropped from the board. Rec. 214 top.

Page 61. There is no evidence in the record to show why the vacancy on the board of directors caused by Selwyn Eddy's declining to serve, was not filled.

Counsel might have stated that Mr. Eddy had removed to California, and the boards of directors of banks very frequently keep a vacancy open until some man who will be of special service to the bank is decided upon to fill it.

Page 62. It is claimed that the exceptions to the charge, which were taken in the presence of the jury and before they retired, were not sufficiently definite. This will be answered by reading the exceptions taken, especially in view of the fact that the objections then made had been urged upon the attention of the trial judge practically on every day of the long trial.

Page 62. Notwithstanding that the plaintiff's first judgment was set aside on the question of the measure of damages, and that the second judgment was conditionally set aside, unless reduced about one-third, upon the same question, he persists in his error as to the rule which governs the measure of damages, and in the course of the trial, and under the charge, defendants were absolutely precluded from showing what the stock was really worth, for they were entitled to the benefit of any enhancement of it for any reason.

Andrews, as a business transaction, March 23rd, 1905, bought of Woodworth $2\frac{1}{2}$ shares of stock at \$150 each. Rec. 371-2.

The price of the stock sold to Andrews was not arbitrary. It was an actual sale. *Ib.*

The contention was made at the first trial that the stock was only worth 20%. In plaintiff's declaration, it was alleged to have "no value." Rec. 14, 2nd par.

Page 66. The cases cited for plaintiff are subject to the same discrimination now that they were before.

No new law has been laid down either in the *Thomas* or *Yates* case. Each arose under state laws, and each was tried in a state court. If a person knowingly deceived another by means of a report, or a personal statement, as in the *Thomas* case, he would be liable under the state law or under the bank statute. In that case only, the three directors who attested the reports were sued.

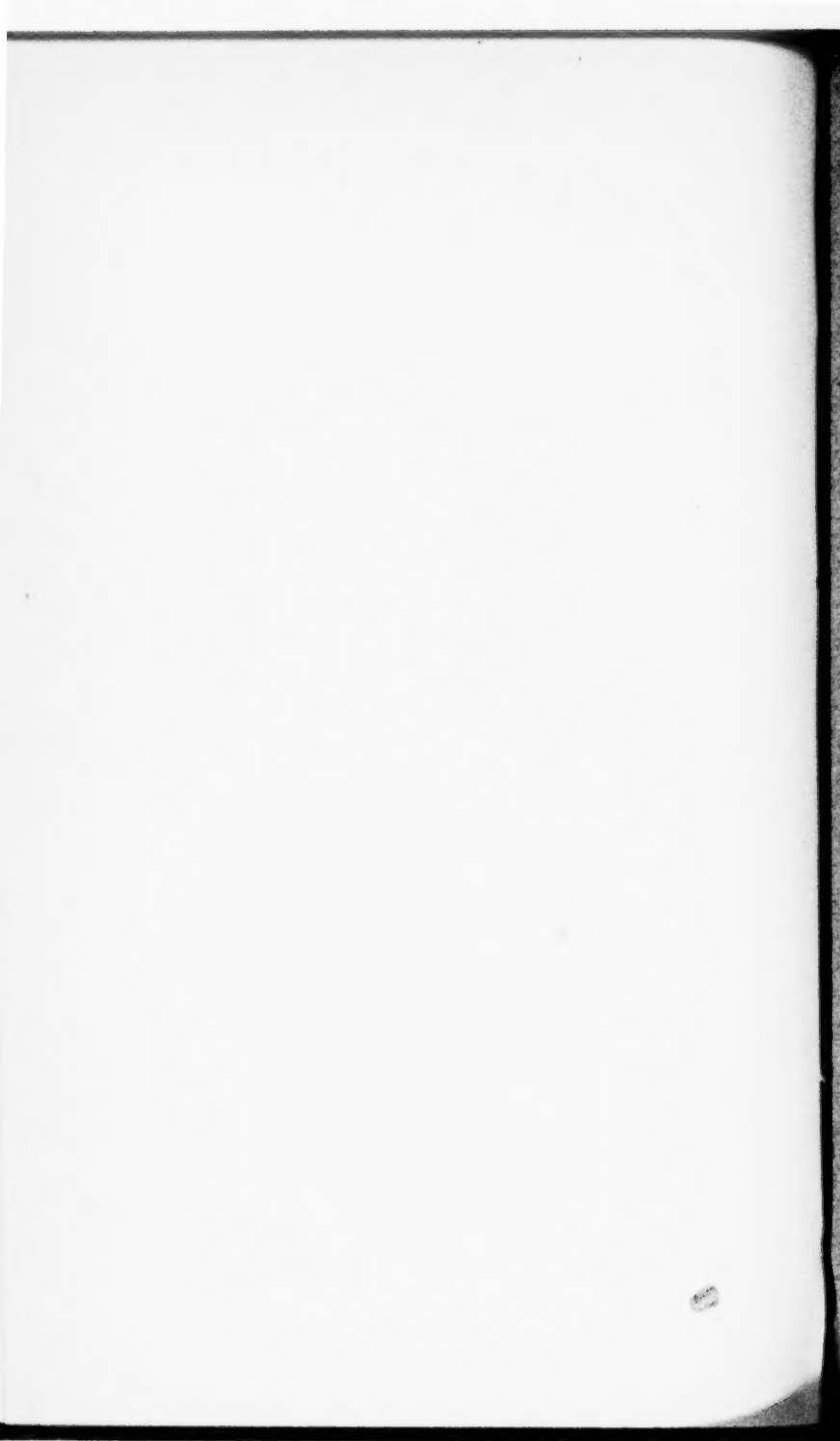
I respectfully submit that the judgment of the Court of Appeals, in so far as it affirmed a portion of the judgment of the district court, should be reversed, and the case should be remanded to the district court and there dismissed or judgment rendered for defendant Chesbrough.

Thomas S. C. Meador

Attorney for Plaintiff in Error.

Frank P. Chesbrough.





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JAMES D. MAHER

CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 179

FRANK P. CHESBROUGH, PLAINTIFF IN ERROR,
vs.
 FRANK T. WOODWORTH.

No. 180

FRANK T. WOODWORTH, PLAINTIFF IN ERROR,
vs.
 FRANK P. CHESBROUGH.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
 FOR THE SIXTH CIRCUIT.

BRIEF FOR FRANK T. WOODWORTH, PLAINTIFF IN ERROR
 IN NUMBER 180.

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(24,819)

(24,820)



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No. 180

FRANK T. WOODWORTH, PLAINTIFF IN ERROR,
vs.
FRANK P. CHESBROUGH.

**BRIEF FOR FRANK T. WOODWORTH, PLAINTIFF
IN ERROR IN NUMBER 180.**

I. STATEMENT OF THE CASE.

In the trial court, Woodworth was plaintiff and Chesbrough defendant. On account of the confusion in nomenclature caused by the cross writ of error, we so refer to the parties here.

Defendant was a director of the Old Second National Bank of Bay City, and the action was based upon his violation of the National Bank Act, in respect to the making and publishing of false reports of the condition of the bank. Plaintiff bought a large amount of almost worthless stock at a high price, in reliance upon reports which included at their face value among the resources of the bank, assets which were and were known to be worth several hundred thousand dollars less than their face value. The case is, therefore, of the same general class as the cases of

Yates v. Jones Nat. Bank, 206 U. S., 158;

Thomas v. Taylor, 224 U. S., 73;

Jones Nat. Bank v. Yates (Apl. 3, 1916), 36 Sup. Ct. Rep., 429. (Not yet officially reported.)

There were originally two defendants. One (McGraw) abandoned his defense and did not join in the writ of error (Rec., p. 391). The case has been twice tried before a jury and has been twice before the Circuit Court of Appeals for the Sixth Circuit.

Chesbrough v. Woodworth, 195 Fed., 875;

Chesbrough v. Woodworth, 221 Fed., 912.

The Circuit Court of Appeals reversed the first judgment because it included damages for certain items which the Court held should be excluded. The second judgment was reduced from \$23,714.00 to \$16,005.44 and affirmed for the latter amount (Rec., pp. 420-422). The plaintiff complains of the reduction of the judgment, and the defendant complains of its affirmance as reduced. A motion to dismiss the cross writ of error was made and submitted at the opening of the October, 1915, term, and on October 18, 1915, this Court entered an order postponing the further consideration of the motion to dismiss until the hearing of the case on the merits.

The following are such of the facts as are necessary to understand the questions of law involved:

Defendant was a director of the Old Second National Bank of Bay City, continuously from the year 1894 (and previously) to the year 1905 (Rec., p. 49).

From the year 1899 to the year 1905 and during all of the transactions which form the basis of this suit the capital of the bank was \$200,000 (Rec., pp. 3, 5, 8, 10, 13, 69, 153, 154). During the year 1903, the bank's entire loans and discounts amounted to approximately one million dollars (Rec., pp. 2, 5, 7, 10 and 12). In June, 1902, the sum of \$465,000.00 (Rec., p. 73), which was more than twice the capital of the bank and almost one-half of its entire discounts, was represented by what was practically the accommodation paper of Alzina Maltby, the wife of an insolvent, Alvin Maltby, who, having failed, was doing business in his wife's name under the trade name of the Maltby Lumber Company (Rec., pp. 68, 69, 107, 329). The bank actually lost \$226,000 on the Maltby paper (Rec., p. 103), all of which had to be charged off, thus reducing the capital stock by one-half, wiping out the surplus and undivided profits and preventing the payment of any dividends for many years.

The Maltby paper was originally discounted by Orrin Bump, who was the president of the bank and actively in charge of the discounts until November, 1902, when he left the bank on account of ill health (Rec., pp. 62, 71, 72, 95, 106, 108). After that time the Maltby papers taken, upon which the losses were made, were in the nature of renewals of the original drafts (Rec., pp. 147, 148, 149). The Maltby loss, therefore, was actually suffered by the bank before Mr. Bump went away in November, 1902, although none of the bad paper was charged off the books until February 20, 1905 (Rec., p. 54). In the meantime, and during the entire year 1903, all of the Maltby paper was carried upon the books, and included in the published reports at its face value (Rec., pp. 51, 106, 211, 279, 281), so that during that year the apparent value of the stock was between \$150.00 and \$160.00 per share, while its real value was very much less than par. Plaintiff, during the year 1903, invested \$23,420.00 in the purchase of this stock at approximately its apparent or "book" value, the par value of the shares purchased being \$15,500.00 (Rec., pp. 31-34). During all of this time the defendant and other directors of the bank were selling or had sold large portions of their stock. (See below.) Plaintiff did not buy his stock directly from the

defendant, and his action is not based upon any privity between himself and the defendant, but merely upon his rights as a member of the public who was induced to buy almost worthless stock as a result of the knowing violation by the defendant of the provisions of the National Bank Act.

It was charged and proved that defendant, Chesbrough (whatever may have been his participation or lack of participation in the original discounting of the worthless paper), knowingly permitted it to remain on the books of the bank among the loans and discounts for a year or more after its true character was thoroughly understood, and that he not only knowingly permitted the published statements to automatically reflect the false values shown by the books, but also added the weight of his signature to the published reports of which special complaint is made. That plaintiff bought in reliance upon these reports, and should recover the difference between the amounts paid and the actual value of the stock at the time he purchased it.

The "Maltby Lumber Company," through which the largest loss (and the only loss now involved) was made, was not a corporation, but a mere trade name used by Alvin Maltby as manager of the business, which was legally owned by his wife, Alzina Maltby (Rec., pp. 68, 69, 107, 329), and which involved the sale of railroad ties and telegraph and telephone poles (Rec., p. 291).

Maltby had been doing business in his own name some years before, and the bank had made a loss on his paper (Rec., pp. 68, 329). He commenced doing business with the bank (for his wife as the "Maltby Lumber Company") some years prior to the year 1902. At this time the "Maltby Lumber Company" had almost no capital and no commercial rating (Rec., pp. 292, 329, 330). The building up of its fictitious capital between the years 1898 and 1902 is shown by the annual trial balance for those years (Ex. 84; Rec., pp. 97-98).

During the year 1902, and previous years, the bank was led into a course of dealing with Maltby, by which it discounted drafts drawn upon railroad and telegraph com-

panies without forwarding them for acceptance. The drafts were held at the bank until maturity and then taken up by Maltby's office without ever having been forwarded for acceptance and without inquiry from or communication with the drawees (Rec., pp. 98, 292, 334, 336). This practice was understood by the directors (Rec., pp. 216, 274). In this way the bank had no independent information that the drafts represented any actual indebtedness from the drawees to Maltby. It apparently accepted Maltby's mere statement, together with his invoices, and, in some cases, what were claimed to be bills of lading and inspection certificates, but which were not what they purported to be and many of which were actually and plainly fraudulent (Rec., pp. 107, 208, 336, 337; Ex. 162; Rec., p. 150). When the paper matured it was repeatedly renewed with the same old fraudulent "collateral" (See Exs. 154-161; Rec., pp. 147-149; also Rec., pp. 287, 288, 335).

In June, 1902, these Maltby drafts held by the bank amounted to \$465,922.38 (Rec., pp. 71, 73). Defendant was present at the directors' meeting of May 23, 1902 (Rec., p. 59). Following this meeting, the regular semi-annual examination of the bank was made by the board of directors (See by-laws; Rec., pp. 55-56), and their report was received and placed on file at the meeting of May 31, 1902 (Rec., p. 59). Defendant was one of the directors who made this examination and signed this report (Rec., pp. 283-284). Apparently at this time the board of directors fully realized the danger involved in the carrying of the Maltby paper, as they commenced their efforts to reduce the account in June, 1902, from which time all of the officers and directors of the bank were doing everything possible to reduce it (Rec., pp. 71, 73, 201, 203, 269, 274, 333). It could not be reduced as rapidly as expected (Rec., pp. 71, 73), but they succeeded in reducing it some \$63,000 between June and October, 1902 (Rec., p. 71). Before Mr. Bump left the bank in November, 1902, he had had many conversations with the directors about the Maltby line, in which they expressed concern and urged reduction, and he attempted to reassure them, but which showed a recognition of the danger on the part of the board, including the defendant (Rec., pp. 194, 264, 268, 273, 274). The Maltby

line was frequently discussed at the board meetings (Rec., p. 200), and also on the street and at other meetings of the officers and directors of the bank (Rec., pp. 200, 216, 244, 264, 268, 280). This was before the receipt of the Comptroller's letter of October 21, 1902 (Rec., p. 70).

An examination of the bank was made by a National bank examiner on October 3, 1902 (Rec., pp. 70, 217). The board of directors held a meeting on the same day, and the bank examiner was present at that meeting (Rec., p. 217), as was also the defendant Chesbrough (Rec., pp. 61, 217). The subsequent action of the Comptroller of the Currency grew out of the report of this examiner.

On October 21, 1902, the Comptroller wrote to the bank, mentioning the examiner's report and calling attention to the fact that the Maltby drafts were not forwarded for acceptance, and that they were, therefore, in violation of section 5200 of the Revised Statutes. The letter emphasized the fact that the Maltby drafts constituted over forty per cent of the entire loans and discounts of the bank and closed with the words, "This matter should receive prompt attention" (Rec., p. 70).

At this time the Maltby indebtedness still amounted to \$402,060.91 (Rec., p. 71).

The Comptroller's letter was discussed at a meeting of the board of directors, held October 24, 1902 (Rec., p. 71). Mr. Bump was then in Washington and Mr. Andrews was in charge in his absence (Rec., p. 70). Andrews wrote to Bump on the day of the directors' meeting, reporting what had been done, and asking Bump to see the Comptroller of the Currency (Rec., p. 71). On the same day the board passed a resolution instructing McGraw to visit the Maltby drawees and find how much they actually owed Maltby (Rec., p. 62). At the next meeting of October 31, 1902, the board passed another resolution instructing Andrews to write to the Maltby drawees, asking for statements of account (Rec., p. 62). Andrews wrote a number of letters in pursuance of this resolution (Rec., p. 73). The form of these letters is shown by plaintiff's Exhibit 29, on page 74

of the record, the reply to which was a notation at the bottom of the letter which was returned to the bank (Rec., p. 74). The replies to these letters are found on pages 74 to 78 of the record. A very convenient summary of their contents is found on pages 83 and 84 of the record. This summary is a contemporaneous document made by Mr. Andrews himself. It consisted of a list of the principal Maltby drawees, followed by figures in the right-hand column showing the amount of drafts then held by the bank against each of these drawees. In the left-hand column, in pencil, was a notation of the information received from the drawees in regard to their actual indebtedness. This exhibit shows that the \$402,060.91 of drafts represented an actual indebtedness of less than \$35,000, thus at once charging the bank with notice that more than \$365,000 of the Maltby drafts were fraudulent and fictitious. There was a discrepancy of more than \$78,000 in one account—that of the Michigan Central Railroad Company (Rec., p. 83). These letters were at once brought to the attention of the Board of Directors of the bank (Rec., pp. 81, 82).

The attention of the bank's attorney, Mr. Collins, was also directed to the matter in October, 1902, from which time on he gave much attention to it and was called frequently into the bank for advice, so that the Maltby matter was the subject of energetic investigation from October, 1902, until the closing of the account (Rec., pp. 238, 239, 248, 249). Defendant Chesbrough spent part of the winter of 1902-1903 in Chicago and was, therefore, absent from many of the directors' meetings during that winter, but he was present at the most important meeting of November 21, 1902 (Rec., p. 62), and his regular attendance commenced again on March 27, 1903 (Rec., p. 64). He also had special information due to the fact that the bank's attorney, Mr. Collins, was also Mr. Chesbrough's personal attorney and met him frequently (Rec., pp. 249, 250), and that Chesbrough was with Collins during an investigation that was made at Chicago (Rec., pp. 238-239, 244). Otherwise the action of the defendant differed in no way from that of the other members of the board, but they acted as a unit (Rec., pp. 110, 191, 207, 212, 251, 264, 265, 268).

The unanimity of the board was such that their action in

regard to matters of the greatest possible importance, such as the signing of the reports and the declaration of dividends, was agreed upon in advance (Rec., pp. 186, 212). They also kept out of the directors' minutes all reference to the investigations and discussions connected with the Maltby account, their method being to discuss such matters informally and to agree in advance upon the formal action to be taken, which would be the only occurrence noted in the minutes of the board (Rec., pp. 110, 200).

Maltby was finally requested to appear before the board of directors and came before them at the meeting of November 21, 1902 (Rec., pp. 102, 205, 277), at which defendant, Chesbrough, was present (Rec., pp. 62, 277). Maltby at that time produced his inventory of October 31, 1902 (Rec., pp. 205, 277, 330). This inventory (Ex. 247; Rec., pp. 294-318) was fraudulent upon its face, and must have at once apprised the directors of the bank that Maltby had not only been discounting fraudulent drafts, but also that his books and inventories were unreliable and fraudulent. This inventory showed that Maltby claimed to have been worth about \$88,000 on October 31, 1901, and that he claimed to have gained \$97,000 from October 31, 1901, to October 31, 1902, so that his net present worth at the latter date was claimed to be over \$185,000 (Rec., p. 318). The board of directors presumably knew this inventory to be false because such large profits and net worth were in themselves inconsistent with the necessity of discounting fraudulent drafts in order to continue in business. The inventory also showed upon its face that on October 31, 1902, the real estate had been arbitrarily marked up from \$54,000 to \$118,000, the difference of \$64,000 being credited to profit and loss and representing nothing but inflation (Rec., pp. 317-318). That the board appreciated the fraudulent character of the inventory appears from the fact that their answer to Maltby's representation that he was worth \$185,000.00 net and had gained \$97,000.00 in twelve months, was the immediate determination to take possession of all his property, put an agent of the bank (Mr. Lewis) in charge of his office, and close out his business (Rec., pp. 102, 205, 206, 277). From that time they treated Maltby with suspicion (Rec., p. 330).

About ten days after Maltby appeared before the board of directors (Rec., p. 217) (which would be about December 1, 1902), director McGraw made an investigation of the Maltby property for the information of the directors. McGraw went to the various places where this property was located, and made a careful inspection and enumeration of the Maltby assets and an appraisal of their value, which was reduced to writing and submitted to the directors. This was the "McGraw report" (Ex. 223; Rec., pp. 218-223), which is mentioned so prominently in the opinion of the Circuit Court of Appeals. This report showed that the Maltby property was worth so little as to render inevitable a loss of more than \$200,000.00 on the Maltby paper.

Mr. Collins, the attorney, testified that from the date of the November meeting the Maltby account was "a matter of constant discussion" both in and out of the board meetings. That "that applies to each and every one of the directors," and that he talked it over frequently with defendant Chesbrough (Rec., p. 244).

Mr. Collins went to Chicago to further investigate the Maltby discrepancies, and, while there, met Mr. Chesbrough, who was spending part of the winter there. Mr. Chesbrough assisted Mr. Collins in his investigations and they discussed the subject together (Rec., pp. 238, 239, 244).

Maltby was again called before a committee of directors in January, 1903 (Rec., p. 239). The bank then had evidence disproving Maltby's claims (Rec., p. 248), and he was called before the committee merely for the purpose of telling him "that he should turn over the whole of his property to the bank" (Rec., p. 239). The bank immediately proceeded to get all the security it could and all that Maltby had (Rec., pp. 108, 236, 239, 240), although the actual conveyances were not executed until some months later. When the deeds were obtained they were taken, not in the name of the bank, but in the name of James Davidson, the president of the bank, without anything to indicate to the public that it was not a personal transaction of his own (Rec., pp. 109, 210, 247). The reason for so doing was to keep the public in ignorance of the situation (Rec., pp. 109, 247).

Because of Mr. Davidson's financial standing the public would not consider the conveyance of these lands to him as anything unusual (Rec., p. 109). Maltby had no title except tax titles to much of the land inventoried and conveyed (Rec., pp. 125, 248). The bank's attorney examined the abstracts (Rec., p. 248).

Lewis took possession of the Maltby office early in January, 1903 (Rec., p. 118). The fact that he represented the bank was not made public, but he was ostensibly an employee of Maltby (Rec., p. 118). He made many verbal reports to the officers and directors of the bank, including the defendant (Rec., p. 119), and also submitted monthly statements. The scope of these statements varied from month to month, but they always included a statement of "accounts receivable" and of "home drafts" (Exs. 68-83; Rec., pp. 87-94). "Home drafts" were the drafts which were held by the bank without being forwarded for acceptance, while "accounts receivable" showed the actual amounts due from the drawees. In January the debit balance of "accounts receivable" was only about \$10,000.00 (Ex., 69; Rec., p. 88), while the "home drafts" amounted to \$319,071.91 (Ex. 68; Rec., pp. 87-88), so that even if Maltby's tangible assets were worth \$100,000.00, a loss of more than \$200,000.00 by the bank was then inevitable and apparent. Two accounts, the American Telephone and Telegraph Company and the Michigan Central Railroad Company, alone showed a discrepancy of \$175,000.00 (Exs. 68-69; Rec., pp. 87-88).

All the Maltby paper taken after Mr. Bump left the bank in November, 1902, was in the form of renewals of the old paper until after Mr. Lewis went into the Maltby office, at which time a new line of discounts was opened, supervised by Mr. Lewis, with proper precautionary measures which protected the bank (Rec., p. 94). This new line was distinguished by Mr. Andrews by the word "new," the old Bump drafts and their renewals being called "old" (Rec., pp. 89, 94). They were separated as "old" and "new" in the statement of home drafts of February, 1903, and thereafter (Rec., pp. 89-94). Plaintiff's Exhibit 162 (Rec., p. 150) is a classification of the collateral which was attached

to these "old" drafts and their renewals during 1903. Of these, some \$95,000 had no collateral whatever, and, of the remainder, none of the bills of lading, inspection certificates or other pretended collateral were dated after January 1, 1903 (Rec., p. 150). During the whole time in controversy during the year 1903, therefore, these old drafts amounting at all times to more than \$240,000 (Rec., p. 94), even after payments had been made from the sale of the Maltby assets (Rec., p. 110) were renewed from time to time as live paper, being given the appearance of secured paper by pinning to each renewal the old collateral already known to be worthless, and referring on its face to property which had been shipped and delivered to the drawees a year or so before (Ex. 162; Rec., p. 150). Only about \$16,000 of this paper had any pretended collateral dated after October, 1902, and none of it was dated after January 1, 1903 (Rec., p. 150). On July 16, 1903, the form of the paper was changed to demand notes of the "Maltby Lumber Company" (Exs. 154-160; Rec., pp. 147-148).

During the entire year 1903, the defendant and the other directors knew that this "old" paper was carried on the books and in the published reports at its face value and purported to be secured by collateral, while, in fact, the collateral was not only worthless in its inception, but, even if good originally, showed on its face that it had lost its value upwards of a year before. They also knew that even if Maltby's general assets were worth \$100,000.00 there would still be a net loss of \$200,000 on the Maltby paper. They, nevertheless, made no effort to charge it off, but kept the situation concealed from the public by carrying it at its face value in the reports, while they sold their stock and that of their relatives and friends. To assist the sale of their stock at a high price, they also continued to pay five per cent semi-annual dividends up to and including November, 1903 (Rec., pp. 59, 62, 65, 68), although they knew that such action was wholly unwarranted until the amount of the Maltby loss was determined, and that the payment of these dividends deceived the public in regard to the condition of the bank.

During the year 1903, Andrews kept a careful account of the reduction of the old drafts, so that the condition of the old line was at all times before the eyes of the cashier and the board of directors (Ex. 67; Rec., p. 86). In most cases the old drafts were not paid by the drawees themselves, but the bank was trying to reduce the amount by payments made directly from the assets of the Maltby Lumber Company under the control of Mr. Lewis (Rec., p. 110). In spite of these efforts, the old drafts or demand notes still amounted to \$251,174.63 in November, 1903 (Ex. 161; Rec., p. 149), and were shown by Andrews' statement of "home drafts, old" to amount to \$243,674.63 (Ex. 82; Rec., p. 94).

About May 15th, 1903, the bank received a second letter from the Comptroller of the Currency, dated May 13. This letter contained the following:

"As heretofore advised, too large a proportion of the bank's funds have been used to take up drafts of the Maltby Lumber Company upon various railroad, telegraph and telephone companies. This line is in no sense commercial paper as contemplated by Section 5200, U. S. R. S., and is considered a source of danger to the bank. This accommodation should, therefore, be reduced to not more than ten per cent of the bank's capital as rapidly as it can be safely done" (Ex. 27; Rec., p. 72).

Andrews replied, under date of May 19th, that the Maltby line was receiving the most thorough attention of the officers and directors of the bank, and that it would be reduced as fast as could be done with safety (Ex. 28; Rec., pp. 72-3).

The bank employed an expert (Carswell) to investigate the Maltby lands and personal property and he made weekly or monthly reports to the bank's attorney (Rec., pp. 364-365, 237). He found much of the land valueless or in the possession of "squatters" (Rec., pp. 365-366). To much of it Maltby had practically no title (Rec., p. 125). Abstracts were examined by the bank's attorney (Rec., p.

248) and the real estate was appraised by Carswell. Its appraised value amounted to only ten or twelve thousand dollars (Rec., p. 366), as compared with the \$118,833.62 at which it was carried in the Maltby inventory (Rec., p. 318).

The indebtedness was carried along in the form of demand notes until August, 1904, when the bank caused the formation of the Maltby Cedar Company, a corporation, owned by the bank, to which the Maltby assets were all conveyed (Rec., pp. 108-109). The demand notes were then incorporated into two notes amounting to \$275,285.17 of the Maltby Cedar Company (Rec., pp. 147-148). The defendant, Chesbrough, was made one of the directors of the Maltby Cedar Company (Rec., p. 118).

The bank (as the Maltby Cedar Company) sold the Maltby property as rapidly as possible and, at the time of the trial, had disposed of all of it, realizing upon it to the best advantage and applying all receipts upon the old indebtedness (Rec., pp. 120, 103, 104). The amount actually charged off to profit and loss was the sum of \$226,000, which represents the actual loss made by the bank on the Maltby paper (Rec., p. 103). As shown above, this loss was actually made before October, 1902, when Bump left the bank, although not charged off until a later date.

On account of this and other losses, the bank reduced its capital stock by one-half and charged off \$135,000.00 of the Maltby paper in February, 1905 (Rec., pp. 48, 54). The balance of the Maltby paper was carried along and charged off in installments from year to year, so that the reduced capital of the bank would not seem to be impaired while it was being built up from the earnings (Rec., p. 48). No dividends were paid after 1903, and in this way, by careful management, the bank escaped liquidation.

In addition to his participation in all the important acts of the board of directors during the entire year 1903, the defendant also lent the weight of his name to certain of the published reports, which included among the "resources" of the bank more than \$220,000 of "old" Maltby paper,

known to be worthless, and which showed the bank to have an unimpaired capital, a surplus of \$75,000 and large undivided profits, while, in fact, it had no surplus or undivided profits, and had lost the greater part of its capital. The reports signed by defendant, Chesbrough, in 1903 were those of April 9th (Rec., pp. 5-6), September 9th (Rec., p. 11), and November 17th (Rec., p. 13). His name was incorrectly printed in the first publication of the September report, but afterwards corrected (Rec., p. 11).

On May 6, 1902, defendant, Chesbrough, sold \$5,700.00 of his stock out of a total of \$6,700.00 (Rec., p. 143). At about the same time he had a conversation with one S. O. Fisher, a lumberman and banker of Bay City, at which he told Fisher that there would be a large shrinkage in the value of the stock and that there were some accounts in the bank that he thought there would be large losses on (Rec., pp. 112, 113, 116). The occasion of this conversation was the fact that Fisher had contemplated buying the stock as an investment of trust funds (Rec., pp. 111-117). This was almost a year before plaintiff bought his first stock. Chesbrough gave contradictory testimony in regard to this occurrence (Rec., pp. 270-271).

As stated above, the stock sold by defendant, Chesbrough, was 57 shares out of a total of 67 shares. His retention of the ten shares unsold was as significant as the sale of the 57 shares. Chesbrough retained the ten shares at Bump's solicitation so as to enable him to still qualify as a director (Rec., pp. 262, 263, 271). This anxiety about his remaining on the board was presumably due to the desire to avoid disclosing the Maltby situation to any new director who might otherwise succeed him. Chesbrough contradicted himself on cross-examination in respect to his reasons for selling the 57 shares (Rec., p. 274).

Chesbrough was not the only director who was selling stock, although his superior information or better judgment caused him to sell his stock some months before the others. Beginning with April, 1903, and continuing through the year (during which time the public was in ignorance of the condition of the bank and the plaintiff, Woodworth,

was making his heavy purchases of stock) there was a constant succession of sales made by directors, or their wives or relatives. Such sales were made by Mr. Bump, the president; Mr. Andrews, the Cashier, and by Directors Cook, McGraw and Aaron Chesbrough, as well as by Mrs. McGraw, Mrs. Cook and Mrs. Curtiss, who was a sister of McGraw (Rec., pp. 134-136, 140, 142, 143, 361, 362). Aaron Chesbrough was a brother of defendant, Chesbrough (Rec., p. 135). One feature of the situation, showing apparently a concerted plan among certain of the directors to dispose of their stock, was the fact that McGraw acted as messenger or agent in listing the stock belonging to Aaron Chesbrough, Andrews and Mrs. Cook, as well as the stock belonging to McGraw himself and his wife (Rec., pp. 134, 135). Precautions were taken so that the purchasers were kept in ignorance of the identity of the sellers. Instead of producing the certificates themselves for transfer, they were left in the bank and receipts issued which did not disclose the name of the owners. These receipts were surrendered and new certificates issued to the purchasers, so that the purchasers did not know, and in some cases the broker was also ignorant, of the identity of the sellers (Rec., pp. 139-141). Plaintiff did not know whose stock he was buying or that the directors of the bank were selling their stock (Rec., pp. 31, 32, 41).

When listing the first block of stock, McGraw told the broker that he listed it with him "because it did not look well for a director of the bank to sell his own stock" (Rec., p. 135). Later, when he listed his own stock, he represented to the broker that "it was owned by outsiders" (Rec., p. 135).

Plaintiff bought his first stock in March, 1903, upon the solicitation of the broker with whom the stock had been listed by McGraw. The broker argued that the ten per cent dividend which the bank was paying would mean an income of more than six per cent even at the high price which he asked for the stock (Rec., p. 27). He showed plaintiff a copy of the published report of February, 1903, and plaintiff compared the figures there shown with a

statement made for him by Mr. Andrews on inquiry at the bank (Rec., pp. 27, 35). This purchase involved stock of the par value of \$2000.00 for which plaintiff paid \$3200.00. Other similar purchases were made in May, September and December, 1903, the total price paid being \$23,420.00 for stock of the par value of \$15,500.00 (Rec., pp. 31-34). Eighty out of the one hundred and fifty-five shares were bought as late as December 16, 1903 (Rec., p. 34). Plaintiff knew nothing about the Maltby paper or Maltby's dealings with the bank (Rec., p. 35) and relied upon the published reports of the bank which he always read carefully (Rec., p. 31). He was also influenced by the confirmation of these reports by Mr. Andrews from the books of the bank, both in March and December, and also by the fact that the bank was paying semi-annual dividends of 5% (Rec., p. 35).

Plaintiff's purchases were all made between March and December, 1903. His first purchase was a full year and his last purchase a year and nine months after defendant, Chesbrough, sold his stock and told the witness, Fisher, that the bank would sustain heavy losses. The Comptroller's warning, the submission of the inventory by Maltby, the investigation by the directors and their attorney, and the first steps in the closing up of the Maltby business, all occurred several months before plaintiff bought his first stock and more than a year before he bought his last stock. During the entire year 1903 the Maltby paper was carried at its face value among the resources of the bank in the published reports, and plaintiff was permitted to buy almost worthless stock in reliance on these reports, while the directors and their relatives were selling their own stock at a high price and carefully concealing from the public the true condition of affairs.

The Theories Upon Which the Case Was Submitted and Decided in the Lower Courts.

Upon both trials the case was submitted to the jury under very strict instructions (based upon the opinion of this Court in *Yates v. Jones National Bank*, 206 U. S., 158), making it necessary for the jury to convict defendant of actual conscious knowledge of the falsity of the reports before liability could be imposed. Upon the first trial the measure of damages applied was the difference between the price paid and the actual value of the stock at the time of each purchase. In addition to the Maltby loss, there had been a large loss made on another account (Brotherton) with respect to which defendant was also charged with liability upon substantially the same grounds as in respect to the Maltby paper. The Circuit Court of Appeals (See 195 Fed., 884; et. seq) held that there was not sufficient evidence to go to the jury in respect to the Brotherton items. They also held that the ordinary rule of damages should not be applied, but that plaintiff could recover *only so much of his loss as defendant knew he would sustain at the time of the purchase*. That because (in the opinion of the Circuit Court of Appeals) defendant did not know that the Maltby loss would exceed \$135,000.00 therefore plaintiff's damages should be confined to such proportion of the damages actually suffered as the sum of \$135,000.00 bore to the total losses sustained. The Circuit Court of Appeals thus virtually permitted the defendant to violate the statute with impunity, so far as concerned any damages which were not within the actual knowledge of the defendant at the time of the violation, by this means transferring to plaintiff the risk of all the uncertainties of the situation.

Upon the second trial the Brotherton items were abandoned by the plaintiff and the damages were computed upon the theory adopted by the Circuit Court of Appeals. It appearing that the entire Maltby loss was \$226,000, evidence was submitted tending to show (and in our opinion showing conclusively) that defendant at the time of plaintiff's pur-

chase, actually knew that the Maltby loss would exceed \$200,000, thus giving defendant the benefit of the remaining \$26,000 as a margin of justifiable ignorance. This theory was adopted by the jury, and a verdict rendered for so much of plaintiff's loss as was represented by the \$200,000 estimate. The Circuit Court of Appeals affirmed the judgment only on condition that the sum so used as a basis for the computation of damages should be reduced from \$200,000 to \$135,000, holding that beyond this \$135,000 limit the evidence was still too conjectural to support the verdict. We contended that certain new evidence (especially the McGraw report, Exhibit 223), had supplied all possible previous deficiencies of proof in this respect, and the sufficiency of this new evidence was the principal question discussed by the Circuit Court of Appeals in their second opinion.

II. SPECIFICATION OF ERRORS RELIED UPON BY FRANK T. WOODWORTH, PLAINTIFF IN ERROR, IN CROSS-WRIT OF ERROR.

We seek by this cross-writ to raise only one question, viz: the propriety of the reduction of the verdict by the Circuit Court of Appeals. This reduction amounted to \$7,708.56, being the difference between \$23,714.00 and \$16,005.44 (Rec., p. 420). The error of the Circuit Court of Appeals in this respect may be analyzed as consisting of four errors, all of which are covered by the seven paragraphs of our assignment of errors (Rec., pp. 462-463):

1. The adoption of the rule that plaintiff must prove not only a knowing violation of the law by defendant, but also actual pre-knowledge by him of the exact amount of damages which his knowing violation of the law would inflict upon the plaintiff (Par. 6 of Assignment of Errors).

2. A too severe construction of the word "knowingly" (Pars. 1-4 and 7 of Assignment of Errors).

3. An erroneous construction of the legal effect of the "McGraw report," being Exhibit 223, found

on pages 218 to 223 of the record (Par. 4 of Assignment of Errors).

4. The erroneous consideration in this connection of plaintiff's act in signing a certain report in 1905, two years after his stock purchases (Par. 5 of Assignment of Errors).

The above numbers will be retained in discussing these four questions:

III. ARGUMENT.

- (1) *Necessity of Proving Pre-Knowledge by Defendant of the Amount of Damages Which Would Result From His Knowing Violation of the Statute.*

So far as the ruling of the Circuit Court of Appeals on this subject resulted in confining the verdict within the limits of the \$200,000 basis, we, of course, have lost our right to complain. However, we have assigned error upon this ruling in the hope that it might be considered independently, in relation only to its effect upon the reduction of the judgment by the Circuit Court of Appeals. We wish by this assignment of error to retain such benefit as this Court may consider us entitled to by reason of this exception.

The statute (Sec. 5239) creates liability "for all damages * * * sustained in consequence of such violation." The theory that liability must depend not only upon a knowing violation of the statute but also upon the ability to foresee the exact amount of damage which this violation will cause not only inserts a new provision into the statute, but also results in shifting all unexpected losses from the wrongdoer to his innocent victim. We cannot see any foundation for such a doctrine either in reason or authority. The doctrine that the damage recoverable must be such as defendant should naturally anticipate should be confined in its applica-

tion to the *nature* of the damage and not to its exact *amount*. The distinction between "a report false in one element" and "losses to stock purchasers from causes not included within the element so falsified" has a logical basis only when the elements in question have no logical connection with each other—e. g., the Maltby loss and the Brother-ton loss. A report knowingly false in respect to the Maltby paper ought, however, to involve liability for all losses resulting from the Maltby paper. The offending director in such case ought to be charged with knowledge that the extent of the loss can never be accurately determined in advance, and ought to realize that he cannot recklessly shift all responsibility for unknown contingencies upon the shoulders of innocent persons.

(2) *Construction of the Word "Knowingly."*

In discussing this and the following points, we may assume for the sake of the argument that the Circuit Court of Appeals was right in respect to the question discussed above in subdivision (1). We contend that even if we were properly charged with the necessity of proving not only that defendant knowingly violated the statute, but also that he knowingly caused the exact amount of damages suffered by the plaintiff, that even in that case the Circuit Court of Appeals was wrong, because its construction of the word "knowingly" differed from the construction of that word by this Court in the two latest decisions on the subject.

Thomas v. Taylor, 224 U. S., 73;

Jones Nat. Bank v. Yates (Apr. 3, 1916), 36 Sup. Ct. Rep., 429. (Not yet officially reported.)

It is apparent that even if it was necessary to prove not only that defendant knowingly violated the statute, but also that he knowingly caused plaintiff a previously known loss, that it, nevertheless, makes a great difference whether this previously known loss was actually computed at a fixed and definite sum in the defendant's mind (which was what the Circuit Court of Appeals virtually required us to prove) or whether defendant's act (knowing that the Maltby loss

would be a very large one) in recklessly shutting his eyes to the facts and figures calculated to educate him in respect to the amount of this loss, would not in effect constitute knowledge.

The following is quoted from the opinion of Mr. Justice McKenna, who delivered the unanimous opinion of the Court in *Thomas v. Taylor*:

“But, not insisting on this, let us consider the argument of plaintiffs in error. It is that the statement was not voluntary, having been made under the command of the National Banking Act, and, therefore, an element of the action of deceit is wanting; and that such act requires ‘proof of something more than mere negligence and recklessness; nothing short of an intentional violation will suffice.’ *Yates v. Jones Nat. Bank* and other cases are cited to support the contention. The contention goes beyond what was said in *Yates v. Jones Nat. Bank*. The language there is ‘that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional.’ Not, therefore, that as a condition of liability there should be proof of something more than recklessness—not that there should be an intentional violation—but a violation ‘in effect’ intentional. *There is ‘in effect’ an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine.* And such was the conduct of plaintiffs in error in this case. They had notice from the Comptroller of the Currency that \$194,000 of the items counted as assets of the bank were doubtful and should be collected or charged off. This ‘was a direct warning to them,’ as the trial Court said, ‘by the bank examiner and Comptroller, that assets to nearly twice the amount of the capital stock were considered doubtful.’ They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the

bank is a violation of the law. Their directions must be observed. Their function and authority cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."

Thomas v. Taylor, 224 U. S. 73 (81-82).

In the *Jones National Bank Case* the Court said:

"The remaining question is with respect to the evidence of the knowledge of these directors of the falsity of these official reports, *or of such reckless disregard of the truth or falsity of their contents as would show that the participation in, or assent to, the violation of the statute, was 'in effect intentional*
* * *

"There was thus sufficient evidence from these directors themselves that they were scrutinizing the affairs of the bank; that prior to the published official report of September 30, 1892, which was followed by the published official report of December 9, 1892, these directors were examining the condition of the bank; that they were considering the losses sustained, the expenses incurred, and the basis of the dividend declared in July. These were not casual statements, but deliberate assertions of activity of supervision in response to official complaint. *It was plainly permissible, despite their disclaimers and denials, to attribute to these directors the knowledge which men of ordinary intelligence would readily have obtained with respect to the financial condition of the bank in the course of supervision which they professed to be actively exercising.* Assuming that they were ignorant of the frauds that had been committed and concealed by falsified entries, there was warrant for the conclusion that they could not have failed to acquire sufficient information to be aware that the representations in the official reports of the latter part of the year 1892 were materially false and calculated to deceive. The questions of fact, so far as they arose upon a substantial conflict in evidence, were for the trial Court. (Citing cases.) It

is not necessary for us to review the evidence in detail. It is sufficient to say that our examination of it has convinced us that the findings of the trial Court, at least with respect to the last mentioned reports, had substantial support, and, in this view, we must conclude that the reversal of the judgments, as entered in the trial Court, upon the ground of the legal insufficiency of the plaintiffs' case when tested by the Federal statute, was error."

Jones Nat. Bank v. Yates (April 3, 1916).

We do not overlook the language contained in the opinion of the Circuit Court of Appeals indicating that that Court had in mind the opinion of this Court in *Thomas v. Taylor* (*Jones Natl. Bank v. Yates* had not yet been decided), and were not intentionally departing from the rule there laid down, but we, nevertheless, contend that their reduction of the judgment for the reasons stated in their opinion, was, in effect, a departure from this rule. After saying that "plaintiff's theory requires a finding that the directors knew that the Maltby assets would realize less than 45% of Maltby's figures" (Rec., p. 418), the Circuit Court of Appeals, in effect, held that because the discrepancies apparently shown by the McGraw report were to some extent conjectural, therefore defendant had the right to ignore them. What they required us to prove, therefore, was not only knowledge but precise knowledge.

The absence of an honest, intelligent belief was, under the decisions of this Court, sufficient to constitute a knowing violation of the statute. The claimed incompleteness and incoherency of the McGraw report were, therefore, as material in destroying all honest belief in the value of the Maltby assets as were the actual discrepancies which the report definitely showed. The element of conjecture referred to by the Circuit Court of Appeals was not, therefore, an element of weakness in plaintiff's case. Plaintiff had proved definitely that the defendant and the other directors had before them in November, 1902, a report made by one of their number in regard to the amount and value of the Maltby assets. That report, with all its features

either of strength or weakness, was properly before the jury and it was a question for the jury to determine, whether the defendant, with that report before him, and in view of the other facts proved, acted with or without an honest and intelligent belief in the truth of the published reports. Any element of conjecture arising from the incomplete or incoherent nature of the McGraw report, therefore tended to establish plaintiff's case by tending to eliminate the possibility of an honest and intelligent belief in the value of the Maltby assets. The claimed element of conjecture thus entered into the proofs, *after plaintiff had made a prima facie case*, and, therefore, should not have been considered as weakening the verdict of the jury. These facts will appear even more clearly in connection with the consideration of the evidence itself under subdivision (3) next following:

(3) *Legal Sufficiency of the Evidence to Support the Verdict.*

The jury found that the defendant not only had actual knowledge of the falsity of the reports published in 1903, but also that he knew that the assets listed among the "resources" in these reports were worth at least \$200,000 less than the amount at which they were listed, thus resulting in an actual known discrepancy of at least \$200,000. The District Judge considered the evidence sufficient to support the verdict in this respect. Inasmuch as the Circuit Court of Appeals held that the evidence so presented was not sufficient to raise a question of fact for the jury in respect to so much of the loss as exceeded \$135,000, it is necessary to present to this Court a summary of the evidence which was accepted as sufficient by the jury and the District Judge and rejected as insufficient by the Circuit Court of Appeals. As we are concerned only with the sufficiency of the evidence to support the verdict, no distinction need be made between the disputed and undisputed facts. In view of the finding of the Circuit Court of Appeals that there was sufficient evidence to support the verdict in respect to defendant's actual knowledge of the falsity of the reports, and his actual knowledge that the loss would equal the sum of \$135,000.00, it is necessary to mention only so

much of the evidence as has some connection with the amount of the loss. The following facts have a direct bearing upon that question:

1. Defendant was a member of the examining committee which examined the Maltby paper and collateral in May, 1902 (Rec., pp. 283, 284).

2. He was the first of the directors to sell his stock (Rec., p. 143), and gave contradictory reasons for selling it (Rec., p. 274).

3. Shortly after the sale of his stock he told Fisher that there would be "large losses" or "bad losses" (Rec., pp. 112-113). This was an expression of knowledge, not of opinion (Rec., pp. 113-114).

4. After almost six months of active endeavor to reduce the Maltby line, it had been reduced in October, 1902, only from \$465,000.00 to \$402,000.00, and this reduction was less rapid than had been expected (Rec., p. 71).

5. Chesbrough attended the directors' meeting of October 3, 1902, when the bank examiner was present (Rec., p. 217).

6. Chesbrough was the only director who joined with the bank's attorney, Mr. Collins, in making a personal investigation at Chicago (Rec., pp. 238, 239, 244).

7. The fact that Mr. Collins was also Chesbrough's personal attorney resulted in additional discussions between them in regard to the Maltby matters (Rec., p. 249).

8. The Maltby inventory and trial balances were in themselves sufficient to show that an enormous loss was inevitable. The inventory will be considered in connection with the "McGraw report." The annual trial balances from 1897 to 1902 showed very plainly that the Maltby figures were enormously inflated. Ex. 84; (Rec., pp. 97-98), was a collection of the trial balances for these years showing a claimed growth of the "Maltby Lumber Company," in five

years, from a "present worth" of \$4,284.66, October 31, 1897, to a "net worth" of \$185,385.95, October 31, 1902 (Rec., pp. 97-98).

This document (Ex. 84) was made up by Mr. Andrews from Maltby's reports or records a little before Lewis took charge of the Maltby office (January 1, 1903), and to the best of Mr. Andrew's recollection, came before the board of directors (Rec., pp. 95-96). The defendant was, therefore, fully advised before the publication of the first report, of the "mushroom" character of the Maltby business.

9. The letters written by Andrews in October, 1902, showed that more than \$365,000 out of the \$402,000 of the Maltby paper was actually fraudulent (Rec., pp. 83-84).

10. The "McGraw report" was submitted in November or December, 1902. This report will be analyzed below.

11. The statements of "accounts receivable" and "home drafts" (Rec., p. 87, et seq.), and the other reports made by Lewis, showed clearly that the entire Maltby business was saturated with fraud. The comparative worthlessness of the assets was also demonstrated by Lewis' inability to convert them more rapidly into money.

The Maltby Inventory and the McGraw Report.

An analysis and detailed comparison of these two documents shows very clearly that much of the property inventoried was not in existence; that so much of it as was in existence was grossly over-estimated and over-valued, and that these facts were known to the defendant in 1902.

The 1902 inventory may be analyzed as follows:

First. Real Estate. The total valuation of the real estate (including standing timber) in the 1902 inventory, was \$118,833.62 (Rec., pp. 294, 303, 318). This real estate was

not included in McGraw's report, so that what the directors knew in regard to its probable shrinkage in value must be obtained from other sources. The facts appear from the recapitulation attached to the inventory, by which it was shown that the sum of \$64,778.18 represented a mere paper profit arbitrarily added a few days before Maltby appeared before the board for the purpose of "padding" the inventory. Even a hasty comparison of the two trial balances appearing at the end of the inventory as submitted to the directors of the bank, showed that in this way the real estate had been marked up from \$54,055.44 (Rec., p. 317) to \$118,833.62 (Rec., p. 318), that the difference, \$64,778.18, was charged to the profit and loss account (Rec., p. 319), and, therefore, did not represent new purchases of real estate. All this appeared at a glance and must have been one of the first things noticed by the directors as a result of the natural curiosity which they necessarily felt to ascertain how the large apparent profit for the previous year could be accounted for. There was, therefore, ample reason for the jury to find that the defendants knew that a "marked-up profit" of this kind made at a time when Maltby was in desperate financial straits, should be absolutely disregarded, and that the value of the real estate should be taken at not more than the figures which appeared on his inventory prior to this marking-up process. In fact, the real estate brought very much less even than this sum, but we attempted to be conservative and, therefore, charged the defendant with knowledge merely in respect to the fraudulent inflation which was plainly before his eyes as he examined the 1902 inventory. In computing the extent of his knowledge in 1902 of the extent of the Maltby loss, we, therefore, commence with this item of \$64,778.18 on the real estate.

The McGraw report apparently covered all classes of property mentioned in the 1902 inventory except "real estate," "accounts receivable," "personal accounts," and such representative accounts as that called "inventory," which included camp equipment, supplies, office furniture, unexpired insurance premiums, etc. (Rec., pp. 316, 317), and "camps" which represented merely "what money had been paid in the operation of the camps" (Rec., p. 331). After

eliminating these accounts, we find that the 1902 inventory showed personal property consisting of poles, ties, shingles, posts, etc., amounting in all to \$308,801.90 (Rec., p. 318). The McGraw report showed that he did not examine all of this property. A list of the places omitted by him with Maltby's estimates of the value of the property there situated, appears on page 218 of the record, under the heading, "Not Examined," and showing a total of \$39,677.50. It will be noticed that the recapitulation of the figures in the McGraw report (Ex. 223) is in a column headed, "Our Estimate," and is parallel to a column headed, "Maltby Estimate." There is some difficulty in explaining the heading, "Maltby Estimate," inasmuch as the figures in that column do not correspond with the figures in the 1902 inventory. The explanation, however, apparently lies in the fact that the figures in the 1902 inventory represented the selling price of the property (Rec., p. 132). It is apparent that an inventory based on the supposed or hoped-for selling price and making no allowance for the cost of marketing, deterioration or other elements of loss (Rec., p. 132) could furnish no basis for an appraisal of the property. Apparently when Maltby appeared before the board with his inventory, these facts were discussed, and he gave the board another estimate of the actual or present value of the property, which was considerably less than the supposed selling price as found in the inventory. McGraw apparently used this second estimate of Maltby's as a basis of comparison.

The known shrinkage in the value of the property as compared with the inventory had, therefore, two elements: First, the shrinkage shown by Maltby's estimate as compared with the inventory, and, second, the further shrinkage shown by McGraw's estimate as compared with Maltby's estimate. The first of these elements is very easily ascertained. The total Maltby estimate was the sum of \$176,530.00 (representing the property inspected by McGraw) and \$39,677.50 (representing the property not so inspected), or a total of \$216,207.50 (Rec., p. 218). The total inventoried value of this same property is found by adding the inventoried values of the ties, poles, shingles, posts, and

"round stuff" (Rec., p. 317), which give a total of \$308,801.90.

The first element of the known shrinkage of the personal property, therefore, consists of the difference between this total of \$308,801.90 and the total Maltby estimate of \$216,207.50 or \$92,594.40.

It is equally easy to ascertain the next item of the known shrinkage so far as it applies to so much of the property as was actually examined by McGraw. This represented more than four-fifths of the property in value (Rec., p. 218). To ascertain the known shrinkage of this four-fifths, it is merely necessary to take from page 218 of the record the total footings of the column headed "Maltby

Estimates" \$176,530.00

And subtract from it the total footings of the column headed "Our Estimates" 95,580.47

The difference is \$ 80,949.53

There is still undetermined the known shrinkage on the property not examined by McGraw and estimated by Maltby at \$39,677.50 (Rec., p. 218). It is certainly fair to estimate this shrinkage at the same percentage as the actual known shrinkage on the remaining four-fifths of the property. This is found to be 45.9 per cent, making the estimated known shrinkage on the property not examined by McGraw, \$18,212.97.

Now, taking up the other items in the 1902 inventory, we come first to "personal accounts" inventoried at \$78,356.59 (Rec., p. 318). These personal accounts were not an asset in any sense of the word, but were the amounts charged to different "jobs" and thus represented merely an expense account which in the end would have to be deducted from the value of the property (Rec., pp. 122, 123, 127, 206). This was proper bookkeeping, so long as these accounts were considered mere "representative accounts" and not real assets.

The same is true of the "Camps" account amounting to \$5,782.03 (Rec., p. 318). This was merely a representative account carried for the purpose of keeping a record of the money paid in the operation of the camps (Rec., p. 331).

The account called "inventory," \$12,900.04 (Rec., p. 318) is itemized in another part of the inventory (Rec., pp. 316, 317). It there appears that \$2,884.79 of this amount represented unexpired insurance; that \$1,100.00 represented the equipment of the Bay City office, and that the remainder represented camp equipage, tools, horses, the equipment of branch offices, etc. The directors knew that property of this kind, although it would, no doubt, be useful and necessary in disposing of the assets, would inevitably have to be replaced or, if not, that it would largely disappear during the necessary operations connected with the marketing of the property and that it would have little, if any, value as an asset in the final liquidation. In view of the inevitable shrinkage that always results in the liquidation of large amounts of property, this item could not be reasonably considered as an asset.

In regard to the accounts receivable, it was undisputed that no bad accounts had been charged off on Maltby's books up to the time when Lewis went into the office in January, 1903 (Rec., p. 123).

The total accounts receivable were listed in the 1902 inventory at \$73,115.18 (Rec., p. 318). Mr. Andrews, however, had been in constant correspondence with the customers whose accounts made up these accounts receivable, and the schedule (Exhibit 66) on pages 83 and 84 of the record, shows what he had learned as a result of this correspondence. The figures in the left-hand margin of the exhibit showed what the customers actually owed Maltby. The figures were not footed on the exhibit. By footing them it appears that they amounted to a total of not more than \$33,253.78. The directors had no reason to suppose that any greater sum than this could be realized from the "accounts receivable." The difference between this amount and the face value of these accounts, therefore, represented in the fall of 1902 a known shrinkage which was an im-

portant element in the known loss. This difference amounted to \$39,861.40.

The different items of known shrinkage may, therefore, be summarized as follows:

Real Estate	\$ 64,778.18
Forest Products	\$92,594.40
	80,949.53
	18,212.97
	<hr/>
	191,756.90
Personal Accounts	78,356.59
Camps	5,782.03
Inventory	12,900.04
Accounts Receivable	39,861.40
	<hr/>
Total.....	\$393,435.14

As a result of the above analysis, we, therefore, find that the property listed in the 1902 inventory presented to the directors of the bank in the fall of 1902, an actual apparent shrinkage of \$393,435.14, leaving its apparent value not more than.....\$204,354.22

The liabilities listed in the inventory amounted to 412,403.41

Thus showing an actual ascertained net loss of
at least 208,049.19

The same result may be reached in another way
by taking the known shrinkage.....\$393,435.14

And subtracting from it Maltby's estimate of his
net worth (Rec., p. 318..... 185,385.95

\$208,049.19

The above figures are very conservative. In the first place, the real estate consisted largely of "cats and dogs." It contained many tax titles, or lands to which Maltby had no title or a defective title (Rec., pp. 122, 125). Much of the so-called "real estate" consisted merely of standing timber purchased separately from the land with a time limit for its removal, and a provision for forfeiture if not

removed within the time limited or in case of the non-payment of taxes (Rec., pp. 326, 332). All of these facts were brought to the knowledge of the directors by means of Maltby's "land book," which was a very elaborate record of his lands, containing plats in which the timber rights and land were marked in distinguishing colors and in which the condition of the taxes and the purchase price of the property were also clearly shown (Rec., pp. 293, 324, 325, 326, 328). This book was kept up-to-date and turned over to Lewis in January, 1903, if not before (Rec., p. 328). As a sample of the information to be obtained from this book, it appears from the book that one piece of real estate, listed in the 1902 inventory at \$2,050.00, consisted of a tax title bought in the name of Maltby's clerk for \$291.40 (Rec., p. 333). The land book is full of information of this kind which must have immediately apprised Lewis and the directors that the land was not worth even the amount at which it was inventoried prior to the inflation of 1902. Carswell examined the land and reported to the bank not more than ten or twelve thousand dollars in value that was worth valuing (Rec., p. 366). It is true that Carswell's report was made later, but the facts to be ascertained from the land book were sufficient to show that the figures used by us in estimating the apparent shrinkage in 1902 are very conservative. The same is true in regard to the personal property. This property was very widely scattered, being located at many points in all sections of the State, in small lots, scattered at different points along various branch railroads (Rec., pp. 107, 108, 206, 236, 237, 319). (See, also, McGraw's report; Rec., pp. 218-223; and the 1902 inventory; Rec., pp. 294-318).

The directors knew that there must inevitably be a tremendous shrinkage in the liquidation of this property, and that even if Maltby's inventories and estimates were honest, it would be necessary to sacrifice the property for the purpose of turning it into money. They must have anticipated the long delay and heavy expense to which they would be put in the collection and disposition of such large quantities of widely scattered forest products. They knew that much of the so-called real estate consisted of mere timber rights which would have to be lumbered to prove of any value. They knew that if lumbering operations were attempted,

they would be protracted and expensive, while if they were not attempted, the timber rights would be practically a total loss. They must have anticipated the inevitable deterioration in the quality of the personal property at places where the stocks had been on hand for a long time (Rec., p. 132). Chesbrough had been a lumberman all his life and was active in all lines of the lumber business, including logging. The Chesbrough Brothers had a large lumbering operation of their own in Northern Michigan (Rec., p. 110). In view of all the circumstances, our figures showing a known shrinkage of at least \$208,000.00 in the fall of 1902, are very conservative. This merely means that the directors knew that, under the circumstances, the bank's claim of upwards of \$400,000.00 would not bring more than fifty per cent of its face. In charging them with such knowledge, they are treated leniently. The proofs in the present record fully bear out the correctness of the statement made by defendant's counsel, Mr. Humphrey, that "the remarkable thing is that it (the Maltby property) brought as much as it did" (Rec., p. 53). In view of the evidence, we might properly have claimed the full \$226,000.00 which represented the actual loss to the bank.

The Circuit Court of Appeals met the above arguments with certain comments which seem to indicate a misconception of the situation. In order to meet squarely their attack upon our theories, we print below in parallel columns their comment and our reply:

Comment of Circuit Court of Appeals.

We think there is evidence fairly indicating that the McGraw report was known to Chesbrough, and so there is presented the sharp question whether that report substantially tended to prove the \$200,000 basis. * * * It does support the inference that the directors were put on notice regarding the reliability of the Maltby inventory and it might support the inference that Chesbrough was negligent in not then ascertaining that the loss would be as great as it proved to be, but such negligence is not the issue (Rec., pp. 417-418).

Plaintiff's theory requires a finding that the directors knew the Maltby assets would realize less than 45% of Maltby's figures (Rec., p. 418).

Our Reply.

We concede that negligence is not the issue, but in the language of this Court in the *Jones National Bank Case* "it was plainly permissible, despite their disclaimers and denials to attribute to these directors the knowledge which men of ordinary intelligence would readily have obtained with respect to the financial condition of the bank in the course of the supervision which they professed to be actively exercising."

The mere padding of the Maltby inventory, entirely independent of the McGraw report, would have justified any bank director in assuming at the beginning that the assets were worth less than 50% of their face value. It is a matter of common knowledge that a shrinkage of 50% in liquidation is not unusual, especially where the original appraisal is based upon the selling price (see Rec., p. 132).

There was an interval of time between Maltby and McGraw during which shipments had been continued, of which shipments or their proceeds the McGraw list takes no account and which there is reason to think might reach \$30,000 (Rec., p. 418).

The words "reason to think" and "might" show that this was a question for the jury. There was an interval of only about one month between the two documents. The inventory was dated October 31, 1902 (Rec., p. 318), and was submitted November 21, 1902 (Rec., pp. 102, 277). McGraw's investigation was made within ten days thereafter (Rec., p. 217). Lewis was not yet in the Maltby office (Rec., p. 118), so that if property was shipped out by Maltby during November, the bank had no way of impounding the proceeds, and the loss to the bank was the same as if the property had never been there. This was all a question for the jury.

The two are in many respects incapable of comparison; the McGraw inventory does not on its face purport to be and is not shown to have been complete (Rec., p. 418).

The difficulty of comparison and the apparent incompleteness of the McGraw report result largely from the fact that the inventory named the numerous small stations on the various railroads where the forest products were piled along the track (Rec., pp. 304-316) while the McGraw report named only the railroads upon which these various stations were located; for example, the "McGraw Branch," "Corn-

well Branch," "Moore's Siding," "Geel's Siding," "Scattered lots on D. & M. (Detroit & Mackinac Ry. Co.)," "Clear Lake Branch," "Cameron Branch," "D. & M. R. R. & Alpena," "Scattered lots on Mac. Div." (Mackinac Division of Mich. Central R. R. Co.) (Rec., p. 218). To make a precise comparison between the two documents it would be necessary to know the exact location of every small station on all of these railroads. This, however, did not change the fact that the totals shown by the McGraw report were very much less than the totals shown in the inventory.

It (the McGraw report) seemingly wholly omits any reference to the stock on hand in the two main yards—which two items, by the Maltby inventory, amount to \$153,000 (Rec., p. 418).

We do not find any such omissions. The two main yards were at River Rouge, near Detroit, and at West Bay City. River Rouge was called "Detroit" in the McGraw report (Rec., p. 218), and West Bay City was called "Bay City and vicinity" in the inventory (Rec., p. 313). The Circuit Court of Appeals was apparently confused by this change of names. That the same places were referred to is shown by the fact that "Detroit" is not mentioned in the inventory, and "Bay

City and vicinity" is not mentioned in the McGraw report.

It (the McGraw report) wholly omits any reference to other classes of property inventoried by Maltby at \$201,000, and as to which it is proved only that they did not have the Maltby stated value, but the actual value of which is left a surmise (Rec., p. 418).

The Circuit Court of Appeals must have referred to the following items shown above in our computation:

Real Estate....	\$ 64,778.18
Personal Accts.	78,356.59
Camp	5,782.03
Inventory	12,900.04
Accts. Receivable	39,861.40

\$201,678.24

These items have no place in the McGraw report as the latter purported to cover Maltby's "stock," viz: poles, posts and ties. The \$201,000 referred to was not the total inventoried value of all of these items, but was the shrinkage in these items, as explained above. Their actual value is shown with reasonable certainty, and, if it was not precisely known by defendant, that fact must have weakened, rather than strengthened, his honest belief in the value of the Maltby assets. These arguments should all have been confined to the jury.

Items amounting to many thousands of dollars found in McGraw's detail sheets

We disagree with the Circuit Court of Appeals in this respect. Some of

are omitted from his recapitulation (Rec., p. 418).

the items found in the detail sheets are under different names, and the detail sheets contain some repetitions, but a careful study of the document shows that the recapitulation was intended to and actually did cover all of the property mentioned in the detail sheets. If there was any claim to the contrary, it was a question for the jury.

The above were the only comments made by the Circuit Court of Appeals upon the accuracy of our computations. What they said about the attestation of reports by the plaintiff will be discussed separately below.

To understand why the Circuit Court of Appeals adopted the \$135,000 basis it is necessary to refer to their first opinion reported in 195 Fed., 875. They there emphasize the fact that when the board of directors finally commenced to charge off the Maltby paper in January, 1905, they at first charged off only \$135,000 of this paper and, therefore, "declared that the remaining \$88,000 was worthy of being carried as an asset" (see 195 Fed., 885). Also that the Comptroller's office must have approved this course, etc.

The Comptroller's office could know nothing more about the value of Maltby's poles, posts, ties and lands than the officers of the bank saw fit to disclose. Moreover, the sum of \$135,000 was never intended to represent the judgment of the directors as to the amount of the Maltby loss. At the time this amount was charged off, plaintiff was a director of the bank and he was, therefore, able to give an explanation of the transaction. He explained that the amount charged off was fixed at the sum of \$135,000.00, not as an estimate of the actual loss, but because there was no possibility of charging off more at that time without closing the doors of the bank. To charge off this amount the bank

had reduced its capital to \$100,000.00, in addition to using up its surplus and undivided profits.

“The reason they did not charge off any more was because they did not have surplus enough to do that. * * * It was charged off at different times as the bank earned enough to do it with any small amount until. I think, it was entirely wiped out” (Rec., p. 48).

It seems plain that the above facts would support a judgment upon the \$200,000 basis. The reasons given by the Circuit Court of Appeals for the reduction of the judgment were matters which might properly have been, and no doubt were, considered by the jury. They were matters tending to diminish the amount of the verdict, but were no more conclusive than our arguments to the contrary elaborated above. We contend that in reducing the judgment for the reasons stated, the Circuit Court of Appeals invaded the province of the jury and substituted their judgment for that of the jury upon disputed questions of fact. Plaintiff had proved (by evidence which was not conjectural) the facts which were available to defendant and which were necessarily called to his attention by the requirements of the emergency with which he had to deal. These facts might reasonably be construed by the jury as inconsistent with the honest belief that the Maltby assets would come within \$200,000 of paying the Maltby indebtedness. The Circuit Court of Appeals held that this evidence was insufficient to support the entire verdict because there were still many uncertainties in the situation, and because some of these uncertainties had not been eliminated even by the McGraw report. We might safely admit these premises without admitting this conclusion. The existence of the uncertainties referred to left for decision a question peculiarly within the province of the jury, viz: under all of the circumstances known and unknown, certain and uncertain, what was the condition of defendant's mind. This condition of mind was, naturally, the result of a mass of circumstances, some clear, some obscure, and some possibly contradictory. It is the duty of the jury to draw the necessary inferences from such a mass of facts. There was nothing conjectural about the evidence itself. The jury's legitimate conclusions from this evidence should not be disturbed by an Appellate Court.

(4) *Effect of Plaintiff's Action in Attesting Reports in 1905.*

Plaintiff never owned any stock in this bank until he made the purchases for which damages are claimed. These purchases gave him a large block of stock and, in January, 1905, he was elected a director of the bank (Rec., p. 40). This was more than a year after he bought his last stock and was after the facts in regard to the Maltby and Brotherton paper had been given considerable publicity by a notice to stockholders stating that because of the Brotherton and Maltby losses it would be necessary to reduce the capital stock of the bank from \$200,000 to \$100,000. This notice is apparently not included in the present record, but is mentioned by the Circuit Court of Appeals in their first opinion (195 Fed., 883), and must necessarily be mentioned in discussing that opinion as a part of the history of the case. Within a few days after plaintiff's election as a director it was necessary to publish a report of the condition of the bank and plaintiff attested such a report before the Maltby and Brotherton paper had been actually charged off, but (as recognized by the Circuit Court of Appeals) at a time when it was understood by everyone concerned that the paper was to be charged off immediately. The report was signed within a very few days after plaintiff's election, and he made no investigation of the condition of the bank before signing it (Rec., pp. 40, 47).

Immediately after the publication of this report the directors charged off \$135,000 of the Maltby paper and \$72,000 or \$73,000 of the Brotherton paper (Rec., p. 48), making a total of over \$200,000 charged off at that time. This was taken care of by the reduction of the capital stock from \$200,000 to \$100,000, together with the wiping out of the surplus and undivided profits. Plaintiff testified "the reason they did not charge off any more was because they did not have surplus enough to do that. * * * It (the Maltby paper) was charged off at different times as the bank earned enough to do it with any small amount until, I think, it was entirely wiped out" (Rec., p. 48).

During this wiping out process, plaintiff attested another report (in May, 1905), in which a certain amount of the Maltby paper, afterwards charged off, was still carried among the resources. Defendant's witnesses agreed that plaintiff made no examination of the facts before signing the report either in January or May, 1905 (Rec., pp. 169, 171, 234). The reports were apparently signed perfunctorily and as a matter of form.

Of course, what plaintiff did in 1905 could not possibly constitute a legal bar to his right of action which accrued in 1903. We do not excuse his action in attesting reports in 1905 which still included worthless Maltby paper, whether this action was careless, reckless, or taken deliberately for the purpose of saving the bank. His responsibility, however, for this action was entirely unconnected with his right to recover against the defendant. Anyone who purchased stock of the bank in reliance upon his action or was otherwise damaged thereby, might have had a right of action against him, in which case his motives would have furnished no excuse or defense. All this has been conceded from the beginning. It was also conceded that the fact of the attestation of these reports by the plaintiff was properly before the jury as an admission against interest in respect to the actual value of the Maltby paper. We claim, however, that this was the only legitimate use of the evidence in question and upon the first hearing in the Circuit Court of Appeals that Court so held and used the following language:

"In December, 1904, the directors sent a letter to the stockholders, admitting very large losses, recommending that the capital stock be reduced to \$100,000, and calling a meeting for January 26, 1905, to vote on this plan. January 10, 1905, plaintiff was elected a director. At the stockholders' meeting, the reduction plan was adopted, and the next month, but evidently pursuant to the plan under consideration since December, \$135,000 of the Maltby paper was written off as worthless. On January 17, and immediately after his election as director, plaintiff attested one of the regular, official reports which included among the assets the entire Maltby line at its

face; and in August, 1905, he joined in a similar report which so included the Maltby paper then remaining, being the \$88,000 which was later charged off. We do not find in these acts by plaintiff any estoppel against maintaining this suit; nor is his action taken in January, in reporting the \$135,000 among the assets, of any evidential force against him. The charging off of this amount was so nearly simultaneous with the report, and was so evidently then in contemplation and understood by every one concerned, that no inference against plaintiff should rest on the inclusion of this paper in that report. However, plaintiff's conduct in then reporting and subsequently carrying and, again in August, reporting as among the 'loans and discounts' the remaining \$88,000 of the Maltby paper, upon the basis of the worthlessness of which plaintiff now has a verdict, was for the jury. Where defendants' honesty is to be judged by their conduct in a given situation, and plaintiff is later placed in the same situation and acts as defendants did, they are entitled to argue, with what force they may, that such action by him tends to show such conduct by them to be rightful; otherwise, plaintiff would be stultified. In other words, plaintiff's conduct in this particular is in the nature of an admission that the \$88,000 was not so worthless as to require immediate writing off. Like most other admissions, it is not conclusive, and its force depends upon many contingencies. If, however, the jury which tries the case again should, upon the record then shaped, conclude that plaintiff's knowledge along in 1905 regarding the worthlessness of this paper was equal to that of defendants' along in 1903, and if the jury, influenced in part by this conduct by plaintiff, should conclude that defendants, in 1903, believed that at least \$88,000 of the Maltby paper, afterwards charged off, would be collected, and that the loss would be confined to a maximum of \$135,000, then any recovery by plaintiff should be confined to the same basis."

Upon the second trial the circumstances in connection with the attesting of the reports by plaintiff were submitted to the jury under instructions which followed the opinion of the Circuit Court of Appeals almost literally (Rec., p. 385).

The evidence in question having thus been submitted to the jury and having been given such weight as they thought proper, thereafter lost all its importance in the case.

The Circuit Court of Appeals, however, in enumerating their reasons for the reduction of the judgment, used the following language:

"In reaching this conclusion, another feature has distinct force: After plaintiff became a director and while the bank continued to carry and report as assets all the Maltby paper above \$135,000, plaintiff joined in these reports. We held that this did not amount to an estoppel, but was in the nature of an admission having evidential force. The McGraw report, which is said to establish knowledge against Chesbrough, became part of the books and papers of the bank and was presumptively known also to Woodworth when he signed the reports of 1905. By so much is the evidence against plaintiff stronger than it was before, and by so much more does it seem probable that he is himself guilty of the same kind of conduct upon which he relies to establish his claim against Chesbrough. This increases the necessity that his case should be supported by testimony clearly fit to induce conviction rather than by vague inferences; and this consideration alone is enough to put this case almost in a class by itself as to the degree of proof required to justify submission."

The above merely means that certain of defendant's evidence in rebuttal is given increased weight by the circumstances connected with the McGraw report. But the weight of defendant's rebuttal evidence has no possible connection with the question whether plaintiff made a *prima facie* case for the jury.

If the verdict is supported by the evidence it is solely because plaintiff's evidence made a prima facie case. The question of the weight of the evidence was for the jury alone.

(5) *Motion to Dismiss Cross-Writ of Error. Has Plaintiff Waived His Rights?*

Briefs were submitted for and against this motion and its consideration was postponed until final hearing. We here re-print certain parts of our brief previously filed.

The opinion of the Circuit Court of Appeals (Rec., p. 419) gave plaintiff the option between submitting to a reversal of the judgment and a reduction of the amount by remittitur. Plaintiff filed the remittitur, and it is contended that by so doing he lost his right to the issuance of a cross-writ of error.

A reference to the remittitur (Rec., p. 420) will show that it contains an unusual clause, intended to prevent its operation as a waiver. The proceedings before the Circuit Judge in chambers, in regard to the form of the remittitur and judgment, do not appear in the record, but it may be inferred from the language of the judgment (Rec., p. 422) and of the order allowing the cross-writ of error (Rec., p. 442) that the precise language used and the failure to include in the remittitur a still broader disclaimer of any intention to waive plaintiff's rights in this court, were due to the necessity of obtaining from the Circuit Court of Appeals their approval of the form of the remittitur as a sufficient compliance with the opinion on file.

The most universally approved definition of waiver is the "intentional relinquishment of a known right," and it has been uniformly held that waiver is a voluntary act, and that action is in no sense voluntary which a party cannot decline to take, except at his peril. That the question of waiver is mainly a question of intention.

40 *Cyc.*, pages 252-261, and cases cited.

This Court have approved these rules, holding that "acquiescence and waiver are always questions of fact, and that there can be neither without knowledge."

Pence v. Langdon, 9 Otto (98 U. S.), 578.

Also that waiver must be intentional and with knowledge of the circumstances.

Benneke v. Insurance Co., 15 Otto (105 U. S.), 355.

Estoppel, as distinguished from waiver, implies that the other party has been misled to his prejudice.

40 *Cyc.*, 256-257, and cases cited.

In the case at bar, the act of filing the remittitur constituted neither a waiver nor an estoppel.

The question of estoppel is disposed of by the fact that there were no alternatives before the defendant, Chesbrough, in respect to which his choice was in any way influenced by the filing of the remittitur. His only choice was between the payment of the judgment and the issuance of a writ of error to review it. He chose the latter course, and could not have been influenced in so doing by the filing of the remittitur. In fact, the filing of the remittitur by reducing the amount to be paid would naturally have encouraged the payment of the judgment. His choice as actually made would have been naturally inhibited rather than induced by the filing of the remittitur, and this inhibitory effect was enhanced by the express reservation contained in the remittitur which notified him that the issuance of a writ of error by him would be followed by the issuance of a cross-writ of error by plaintiff. The natural effect of plaintiff's action upon defendant's mental processes was therefore diametrically opposite to that which is supposed to form the basis of an estoppel.

So far as the question of waiver is concerned, by filing the remittitur plaintiff unquestionably waived every right which he voluntarily abandoned, including the right to choose a new trial as an alternative to the filing of the re-

mittitur. However, the making of the election was not a voluntary act, but was a necessity imposed upon plaintiff by the opinion of the Circuit Court of Appeals. It was the imposition of this necessity which he should be permitted to review. The election itself (as distinguished from the nature of the election), being a non-voluntary act, did not constitute a waiver of the right to review the propriety of compelling him to make the election. At the same time, we concede that he has definitely waived the right to make a different election if the right to require an election is upheld by this Court. The only thing waived is the right to change the nature of the election, if an election is finally required.

We think it plain that the question involved is not a question of waiver or estoppel, but purely a question of election. By electing one of the alternatives submitted by the opinion and judgment of the Circuit Court of Appeals, plaintiff finally loses his right to elect the other alternative. This, however, is an entirely different question from that of his right to attack the judgment necessitating the making of the election to which he has always excepted and never consented.

The following authorities were not cited in our brief filed on the motion to dismiss.

In the following case a bill in equity had been filed to enjoin the collection of a judgment. Relief was granted on condition that the petitioner pay to the respondent a certain sum of money, which was paid and received as required by the decree. Respondent appealed and it was argued that he was estopped to prosecute his writ because he had accepted the sum required to be paid to him by the decree which he was attacking. The following is quoted from the unanimous opinion of the Court, delivered by Mr. Justice Matthews:

“Without entering upon a discussion of the general question, it is sufficient for the present purpose to say that no waiver or release of errors, operating

as a bar to the further prosecution of an appeal or writ of error, can be implied except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree, which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel."

Embry v. Palmer, 17 Otto (107 U. S.), 3.

In the following case a motion to dismiss had been made on the ground that the judgment in the court below was in favor of the plaintiffs in error and that before suing out the writ of error they had obtained satisfaction of the judgment by execution and sale. Plaintiffs' entire claim exceeded \$20,000, but they had recovered judgment for only about \$10,000. Property was seized sufficient in amount to satisfy the judgment and enough of it was sold by the marshal to realize more than \$5,000. The sale of the remainder was then postponed at the request of the defendant. Later, the plaintiff issued the writ of error, which it was sought to dismiss. The Court, after stating that "plaintiff may bring error to reverse his own judgment where injustice has been done him or where it is for a less sum than he claims" held that nothing short of a complete satisfaction of the judgment would constitute a bar to the writ of error.

U. S. v. Dashiell, 3 Wall., 688.

The rule is well established that the satisfaction of a judgment is no bar to the issuance of a writ of error to review it. In a case of this nature, this Court used the following language:

"There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and, if reversed, can recover back his money. And a defendant in an action of ejectment may bring a writ of error and, failing to give a supersedeas bond, may submit to the judgment by giving possession of the land, which he can recover if he reverses the judgment by means of a writ of restitution. In both these cases the defendant has merely submitted to

perform the judgment of the Court, and has not, thereby, lost his right to seek a reversal of that judgment by writ of error or appeal."

County of Dakota v. Glidden, 113 U. S., 222.

To the same effect, see

O'Hara v. McConnell, 93 U. S., 150.

In the case at bar, the making of the election by plaintiff (as distinguished from the nature of the election made) was as truly involuntary as the satisfaction of a judgment by a judgment debtor. The judgment debtor might avoid payment by the filing of a supersedeas bond. Plaintiff might have avoided the filing of his remittitur by submitting to a new trial, but he could not by any means have avoided the necessity of choosing between the new trial and the remittitur, and it is of the imposition of this necessity that he complains. In the *O'Hara* case, the Court gave some significance to the fact that the deed which was claimed to have operated as a waiver "recites on its face that it is made under the order of the Court." The remittitur in the case at bar contains a similar clause, and, in addition, expressly negatives waiver. This is what distinguishes our case from the case of

Koenigsberger v. Richmond Silver Mining Co.,
158 U. S., 41.

Waiver being a question of intent, the special clauses contained in the remittitur in the case at bar are sufficient to distinguish it from the *Koenigsberger* case.

We submit that the error complained of has not been waived and that this Court should reverse the judgment of the Circuit Court of Appeals and affirm the judgment of the District Court.

Respectfully submitted,

✓
Edmond S. Clark
John C. Madock. c.

*Attorneys for Frank T. Woodworth,
Plaintiff in Error in Case No. 180.*



(24,819)

(24,820)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 179.

FRANK P. CHESBROUGH, PLAINTIFF IN ERROR,

vs.

FRANK T. WOODWORTH.

No. 180.

FRANK T. WOODWORTH, PLAINTIFF IN ERROR,

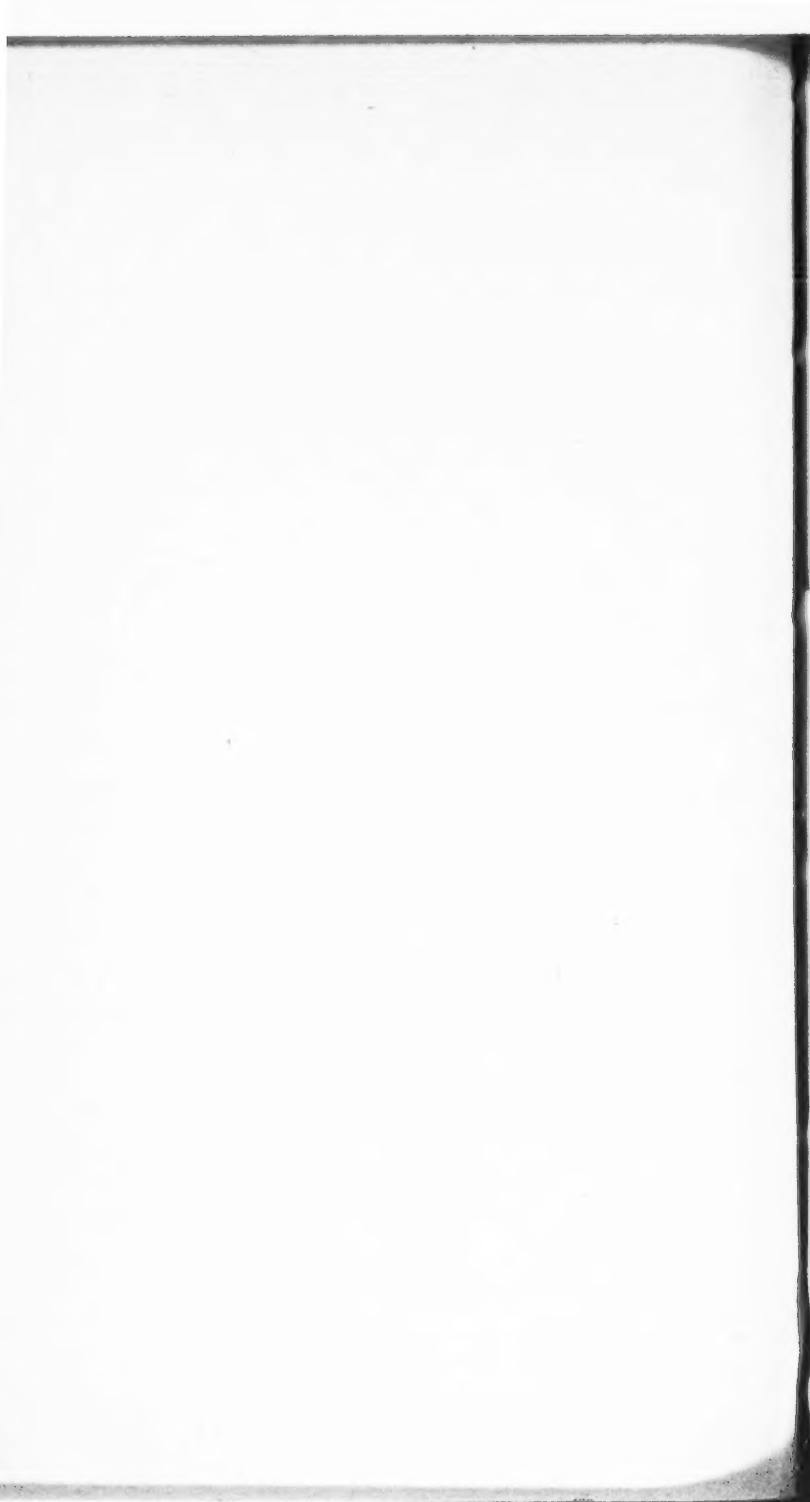
vs.

FRANK P. CHESBROUGH.

In Error to the Circuit Court of Appeals for the Sixth
Circuit.

BRIEF FOR FRANK T. WOODWORTH, AS DEFENDANT IN ERROR IN
CASE NUMBER 179.

EDWARD S. CLARK,
(Bay City, Michigan),
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(24,819)

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vs.

FRANK P. CHESBROUGH.

BRIEF FOR FRANK T. WOODWORTH, DEFENDANT IN ERROR IN CASE
NUMBER 179.

We have already filed one brief in the nature of a brief for plaintiff in error in case number 180. At that time we had not received brief for plaintiff in error in case number 179. This brief is a reply to the latter.

(For the sake of brevity, we will hereafter refer to the brief for plaintiff in error in case number 179 as "defendant's brief" and will refer to the brief for plaintiff in error in case number 180 as "our former brief").

Our former brief contains a connected statement of facts, the accuracy of which is insisted upon.

In addition, we note the following respects in which the statement of facts in defendant's brief is either erroneous or misleading.

The case referred to as the commencement of this litigation in the Michigan courts was not the present case, but a case brought in behalf of Woodworth's sister-in-law (Smalley) to recover similar damages for a similar purchase made by Woodworth for her benefit at the same time that he bought the stock for himself. At that stage of the litigation, evidence was hard to obtain and the Smalley case, because of the small amount involved, was made a test case for the purpose of furnishing opportunities and means for obtaining further evidence. At that time this court had not handed down any of the decisions which now establish the law in cases of this nature, and the only Federal decision available was that of Prescott vs. Haughey, 65 Fed., 653, in which Judge Baker of the District of Indiana had held that an action of this nature raised no Federal question, and should be prosecuted in the state court. The decision of this court in Yates vs. Jones National Bank, 206 U. S., 158, settled the law on the subject and resulted in the discontinuance of the litigation in the state court and its prosecution in the Federal Court.

The above facts are not now important, except as they form part of the history of the case.

It is incorrectly stated on page two of defendant's brief that "the affirmative action of defendants was the only thing complained of in the declaration." This will be discussed more fully in connection with the argument.

It is stated on page two of defendant's brief that only two reports were attested by Chesbrough in 1903. A third report, that of September 9, was published in the newspaper for several days. In some of these publications, the name of Chesbrough's brother who was not a director of the bank, was erroneously substituted for that of defendant Ches-

brough himself. This was corrected before the publication was completed, and the copy of the report which was read and relied upon by plaintiff, that of September 16, contained the defendant Chesbrough's name (Rec., pp. 11, 34).

The presence or absence of Chesbrough's name on any report is of little importance.

We find no support in the record for the statement that the Bank was twice examined by bank examiners during the year 1903, as stated on page four of defendant's brief. No record pages are cited.

The lists of bank directors given on pages four and five of defendant's brief are not supported by references to the record. We do not concede either their correctness or their importance. The important fact is that defendant was a director from 1894 to 1905 (Rec., p. 49).

It is incorrectly stated on page six that the Maltby and Brotherton paper was charged off, and the capital reduced in 1906 after plaintiff had been a director for a year. This was done in January or February, 1905, after plaintiff had been a director for a few days or weeks. (Rec., pp. 48, 54).

Referring to page six, *et seq.* of defendant's brief, this case does not necessarily involve the honesty, ability or integrity of Orrin Bump, or the solvency of the Bank, the honesty of its employees or the accuracy of its books. Mr. Bump was no doubt deceived by Maltby, but this fact was discovered by everyone connected with the Bank long before plaintiff bought his stock. The bank's employees were presumably honest and its bookkeepers presumably made no bookkeeping errors. The damage to the public resulted not from bookkeepers' errors, but from the act of the directors in carrying bad paper as good paper. The fact that the published reports corresponded with the books of the bank in this respect deceived, instead of protecting, the public, and this correspondence between the books and the reports is one of the facts which fastens liability upon the defendant.

It is literally true, as stated, that no stockholder in the bank ever personally asked plaintiff to buy any of his stock, but it is also true that the broker employed by the stockholders and directors did so. The directors did through their broker what they hesitated to do in person.

The statements on page eight of defendant's brief in respect to the belief of the bank officers and directors in respect to the Maltby paper during the years, 1902 and 1903, and the date of the discovery of the Maltby loss, seek to dispose in four lines of the question of good or bad faith, which was the main issue before the jury, and involved the weighing of all the testimony in the record. These were disputed questions of fact and were foreclosed by the verdict.

The facts mentioned on page eight as indicating that defendant Chesbrough had no object in maintaining the market price of the stock during the year 1903, must be supplemented by reference to the fact that his brother, Aaron Chesbrough, did not succeed in disposing of his stock until the summer of 1903. Twenty-five shares of the stock bought by plaintiff were bought from Aaron Chesbrough. (Rec., p. 143). Mr. Bump, apparently a close friend of defendant Chesbrough, did not succeed in selling his stock until December, 1903. Plaintiff got 100 shares of his stock on December 16, 1903, at a high premium. (Rec., p. 361). Seventy shares of this was bought by plaintiff for himself and the other thirty for his wife and sister-in-law. It makes no difference whether Chesbrough was trying to hold up the price for himself or for his brother and friends.

The remaining statements found on pages 8-10 of defendant's brief are either matters of argument or involve disputed questions which were foreclosed by the verdict.

The Court's ruling in respect to evidence of the mental attitude of each of the directors will be discussed in connection with the argument.

The Maltby profits spoken of on page 11 of defendant's brief were purely paper profits. As Maltby's business ex-

panded his inventories also expanded. By inventorying merchandise at its selling price, by omitting to charge off any losses, and by arbitrarily "padding" his inventories when all other methods failed, he succeeded in keeping on his books an apparent excess of assets over his constantly increasing liabilities. As a matter of fact, however, he must have lost money constantly and in large sums for several years prior to 1903.

The statement on page 12 that "Lewis testified that he could not recall a single error in this (1902) inventory," is incorrect. Defendant's Counsel persistently tried to induce Lewis to make this statement, claiming that he had so stated on the former trial. Lewis insisted that his former testimony had been misunderstood, that he was not referring to the 1902 inventory, that he never verified it, and that he never verified any inventory except by merely checking up the clerical work done at the Maltby office. That neither he nor anyone else in the office could verify an inventory made by many different men at many different camps and yards. (Rec., pp. 121, 129, 130, 131, 132, 356). He never reported to the bank that he had verified this inventory. (Rec., p. 133). Mr. Andrews testified to the same effect (Rec., p. 108). The only thing in the nature of an attempted verification of the 1902 inventory was the report made by McGraw which fell so far short of verifying it.

The references on pages 11-16 of defendant's brief to Maltby's testimony in regard to the lands and other property mentioned in the inventory are disposed of by the McGraw report referred to in our former brief. The most conclusive possible evidence that the board of directors appreciated the fraudulent character of the inventory and the comparative worthlessness of the Maltby assets is found in the fact that their answer to Maltby's representation that he was worth \$185,000.00 net and had gained \$97,000.00 in twelve months, coupled with the conceded fact that his indebtedness to the bank was then being reduced, was the immediate determination to take possession of all his property, put an agent of the bank in his office and close out his business. (Rec., pp. 102, 205, 277, 331).

The references on pages 13 and 14 of defendant's brief to an alleged friendship between Woodworth and Maltby are very misleading because the dates are not accurately shown. The dealings referred to between Maltby and Woodworth occurred between 1890 and 1895, before the Mosher failure, and six or seven years prior to the transactions involved in the present case. Plaintiff testified:

"At and prior to the time I made this last purchase, I had no knowledge whatever with relation to the business of the Maltby Lumber Company or any information at all with regard to the line of paper the Maltby Lumber Company had in the Old Second National Bank." • • •

"Q. With the closing out of the Mosher & Company, and the A. Maltby affairs that were brought to a head in 1895 that closed your business with him?

A. That ended my relations with him entirely both as to business and as to personal relations." (Rec., p. 35).

Maltby testified:

"I do not mean to say that Mr. Woodworth had knowledge of the details of my business in 1902 or for some years before that time. After the Mosher failure Mr. Woodworth had very little knowledge of my business." (Rec., pp. 328-29).

The statements on pages 16-18 of defendant's brief in regard to Chesbrough's claimed ignorance of the Maltby paper are disproved by the record, as are also the statements in regard to the method of handling the Maltby business. Chesbrough testified:

"It is true that when the paper was discounted at the bank, it was reported to the board of directors, and it is also true that the paper was approved at the regular weekly meetings, and when the paper was renewed, the renewal paper was reported in the same way and approved by the directors, and every one of those meetings at which I attended, and my attendance is shown by the record in evidence, I voted

in favor of approval of that paper and I knew just what there was behind the paper." (Rec., p. 269).

The minutes show that Chesbrough was present at seventeen of the regular directors' meetings during the year, 1902, and that the meetings at which he was present were well scattered through all months of the year except April, August and December (Rec., pp. 57-62), so that he must have kept in touch with the condition of the Maltby account. As he himself stated, he "knew just what there was behind the paper" (Rec., p. 269). Even by June 1st, 1902, just before which date Chesbrough had served on the examining committee of the board (Rec., pp. 283-284), this paper consisted largely of renewals, with the so-called bills of lading dated from one to six months previously (Rec., p. 150), the same old bill of lading being attached to the renewal as to the original draft. (Rec., p. 336). Many of the so-called inspection bills were made by Maltby's own inspectors (Rec. p. 336), and were therefore absolutely worthless as evidence of sales. Drafts amounting to \$95,655.31 were in the bank with no bills of lading attached or accompanying. (Rec., p. 150). The letters claimed to have been relied on, Exhibits 170-221 and 225-238, (Rec., pp. 174-185, 227-229), were worthless as a protection to the bank. Practically, without exception, they are either found to be written by companies on whose business no loss was made, or else to be dated so long prior to 1902 as to be of no value. The only letters from these particular companies which would be considered as giving "live" information in the fall of 1902 were the letters offered by us, marked exhibits 29-65 (Rec., pp. 74-80) and summarized by Mr. Andrews in Exhibit 66 (Rec., pp. 83-84). The schedules prepared by the accountant showed that the drafts would be renewed for month after month and that Maltby would go through the form of pinning to a draft dated December 26, 1902, an inspection certificate, invoice and bill of lading dated February 21, 1902, ten months before. (Rec., pp. 287-288).

Maltby admitted that when he renewed a draft he used the same bill of lading. (Rec., p. 336). His refusal to answer pointed questions in regard to his methods of deceiving the bank (Rec., pp. 324-338), was as significant as any

answer could be. His methods were all discovered when Mr. Bump left the bank if not before and were all known by defendant in 1902, not in 1903, as stated by counsel. Chesbrough learned of Maltby's false representations from Collins in December, 1902, if not before (Rec., p. 244). Maltby himself refused to dispute Mr. Foss' statement that "Maltby lied and made misrepresentations. We found that out in 1902." (Rec., p. 327).

Mr. Collins testified with reference to December, 1902:

"I ascertained enough to make me believe that Mr. Maltby did not correctly state the matter as to the amount owing from the company to the Maltby Lumber Company, and I think Mr. Chesbrough agreed with me. We certainly did discuss it. I do not know the amount of the discrepancy, but it amounted to a great many thousand dollars." (Rec., p. 244).

We might continue such quotations indefinitely. The effect of Chesbrough's absence from the city during a part of the winter of 1902-1903 was completely discounted by the fact of his coming to Bay City to attend at least one of the meetings when Maltby was present and also by his full discussion of the Maltby account at his meeting with Mr. Collins in Chicago, in December, 1902. The character of the Maltby business and its complete exposure after Mr. Bump's departure in the fall of 1902 are so well established by the record that we do not think it necessary to spend any more time on the subject.

The statement on page 18 of counsel's brief that the 1902 inventory "was afterwards checked over and verified and not a single error found in it" is a repetition of an error already noted.

The nature and amount of the securities taken by the bank as discussed on pages 19-22 of defendant's brief, are explained in our former brief (pp. 26-33) in connection with the McGraw report.

The fact that Chesbrough was not present at the meeting when the Comptroller's letter was first submitted is

entirely discounted by the fact that he soon learned of this letter from others and also that he was present at the meeting of October 3rd when the bank examiner was present and presumably said in person at least part of what the comptroller afterwards said in his letter of October 21st. (Rec., p. 217). The Comptroller's letter was based on the bank examiner's report of his examination made on October 3rd. (Rec., p. 70).

The statements contained on pages 23-30 of defendant's brief under the heading of "Plaintiff Woodworth" are almost wholly incorrect or misleading. In regard to plaintiff's knowledge of the meaning of "loans and discounts" the record is clear that he relied on the belief that the paper listed in the reports under this head was paper that was "good or supposed to be good" although paper "sometimes turns out to be bad," which is "supposed to be good." (Rec., pp. 44-45). The fact that he knew in general how the bank's books were balanced and that the published reports were taken from the daily statement (Rec., p. 37), (although he did not know as much about banking then as now), (Rec., p. 45), merely emphasizes the fact that he relied upon the belief that the books of the bank and the daily statement, as well as the published reports, would correctly reflect the bank's condition. The quotation in regard to the plaintiff's indifference as to the names found on the various reports is incomplete and therefore misleading. The subject will be discussed more fully under a separate heading.

It might be inferred from the statement on page 26 that Mr. D. C. Smalley, a director of the bank was living in plaintiff's family at the time of the occurrences complained of. Mr. Smalley died in 1898 (Rec., p. 35), at a time when the Maltby Lumber Company business had hardly begun. (Rec., pp. 97-98).

The statement on page 26 in regard to the reduction of the capital stock of the bank refers to a reduction made at the time of the Mosher failure six or seven years before plaintiff bought his stock. (Rec., p. 36).

The references on pages 26-30 to the alleged effort to get proxies from Lamont and others to unseat McGraw, and to the so-called "First National Bank pool" are both untrue and unfair. They will be discussed below under a separate heading.

The facts in regard to the signing of the reports by Mr. Woodworth in 1905 are explained on pages 40-43 of our former brief.

The phrase "regardless of their value" referred to on page 27 of defendant's brief needs no explanation if read in connection with the context. (Rec., pp. 43-45).

Plaintiff's acquaintance with Maltby has been already explained. It is incorrectly stated on page 28 of counsel's brief that plaintiff's office was in the same building as Maltby's office. (Rec., p. 138).

There are many incorrect statements on pages 28-29 of defendant's brief. Some have been referred to above and others will be explained hereafter. All that is necessary is to read the context in connection with each of the fragmentary and misleading quotations from the record. It was repeatedly explained that the so-called stockholders' investigation of the bank made in October, 1904, was purely perfunctory and continued only an hour and a half. It occurred almost a year after plaintiff bought his last stock. (Rec., pp. 38, 47).

Counsel's references (pp. 30-32 of brief) to Mr. Chesbrough's planned removal from Bay City to Detroit as bearing on the sale of his stock, are best answered by the following quotation from Mr. Chesbrough's testimony:

"I said on my direct examination, that I sold my stock in the Old Second National Bank because I contemplated moving from Bay City; the reason I sold my stock in the Old Second National Bank, was, because I needed the money.

Q. Did you sell your stock in the Old Second National Bank because you were going to move from

Bay City? A. I sold my stock in the Old Second National Bank because I wanted the money.

Q. I want you to answer that question, yes or no. Did you sell your stock in the Old Second National Bank because you were considering moving from the city? A. No." (Rec., p. 274).

Chesbrough's attendance at meetings during the winter of 1902 and 1903 and his interviews with Mr. Collins at Chicago during that winter, have been already referred to. His testimony in regard to the refusal of a loan for the construction of the steamer Kennebec was at least discredited by Mr. Andrews' inability to remember anything of the kind. (Rec., p. 170). If director A. J. Cooke transferred his stock to his wife as stated, his wife immediately sold it to outsiders. Plaintiff's first purchase of 20 shares of stock was that of Mrs. Cooke (Rec., p. 138). We fail to see how defendant is helped by proof that Cooke, Bump and other directors were selling their stock in the years 1902 and 1903.

Defendant's counsel emphasizes (p. 38) the inaction of the Comptroller's office and the ignorance of the federal bank examiners and claims that the judgment of the Comptroller was final. This conclusion, of course, rests on the premise that the Comptroller and the bank examiners knew as much about the situation as the defendant. In fact the federal officials knew very little. The value of the Maltby paper depended upon the value of lands and forest products scattered throughout the state of Michigan. The inventories on hand were entirely misleading and were never corrected. The Comptroller and the examiners knew just as much as defendant Chesbrough and the other directors saw fit to tell them and no more. Their ignorance and inaction merely illustrate the success with which the directors concealed the true condition of the bank.

Many of the questions above referred to are now immaterial. They involve questions of fact which (if ever of any importance) were foreclosed by the verdict. Nevertheless, we do not feel safe in passing without comment, untrue and misleading statements in regard to facts which might by any possibility be regarded as important.

DECLARATION AND COUNTS IN GENERAL.

The following table will aid the court in identifying the respective counts:

First Count:	Report of February 6, 1903, signed by McGraw, "Assented to and permitted" by Chesbrough. (Rec., pp. 1-4).
Second Count:	Report of April 9, 1903, signed by both defendants. (Rec., pp. 4-6).
Third Count:	Report of June 9, 1903, signed by McGraw, "Assented to and permitted," by Chesbrough. (Rec., pp. 6-9).
Fourth Count:	Report of September 9, 1903, signed by both defendants. (Rec., pp. 9-11).
Fifth Count:	Report of November 17, 1903, signed by both defendants. (Rec., pp. 11-14).
Sixth Count:	Dividend of December 1, 1902. (Rec., pp. 14-15).
Seventh Count:	Dividend of June 1, 1903. (Rec., pp. 15, 16).
Eighth Count:	Dividend of December 1, 1903. (Rec., pp. 16-17).
Ninth Count:	Excessive loans as calculated to deceive the public. (Rec., pp. 17-19).
Tenth Count:	Combination of all counts "General design and conspiracy to deceive the public." (Rec., pp. 19-20).

On the first trial Judge Swan excluded the first count because the report was not actually signed by Chesbrough. He excluded the tenth count as multifarious. The Circuit Court of Appeals held that he was unnecessarily strict in respect to both. That the first count was good (providing that Chesbrough was charged with the necessary knowledge prior to the date of the February report), because the signing of the report was a mere incident, and not the sole basis of recovery. That the tenth count stated "in its terms and by reference and in a sufficiently unitary way what we have described as the substantial asserted grievance, and under

this count, evidence of the dividends might be pertinent." (See 195 Fed., page 883).

Following this opinion, Judge Tuttle on the second trial permitted the first and tenth counts to remain in the case, the jury being instructed however that that part of the tenth count which referred to the ninth count was withdrawn with the latter. (Rec., p. 380). The only other counts upon which plaintiff relied were the second, fourth, and fifth, all of which were based on reports actually signed by both defendants. The third was abandoned because plaintiff bought no stock immediately after its date. The three dividend counts were abandoned and the jury was charged.

"The testimony in regard to dividends may be considered by you only in connection with the tenth count, and plaintiff is not entitled to a verdict even under the tenth count, because of the dividends alone." (Rec., pp. 383-384).

The dividends were therefore excluded as a substantive cause of action and permitted to remain merely for their evidential value in connecting the publication of the various reports as part of a common design.

The Circuit Court of Appeals in their first opinion said that the primary duty involved was "the duty to charge off assets which have become worthless" (195 Fed., 881). In referring to the declaration, defendant's counsel persistently misconstrues it by stating that it complains only of an "affirmative" or active violation of the statute, and that in order to recover for a passive violation it was necessary for plaintiff on the second trial to abandon the theory of the declaration, and to "proceed upon a new and different theory." There is no excuse for any such misconstruction or delusion.

So far as the declaration is concerned, each count which is based upon a report signed by both defendants alleges, among other things, that each defendant knowingly violated and knowingly permitted and assented to the violation of

(the statute) by signing, attesting and permitting and assenting to the publication of a false report. Each count which is based upon a report not signed by one of the defendants, alleges that that defendant "knowingly violated and knowingly permitted and assented to the violation of (the statute) by permitting and assenting to the signing, attesting and publication of the said report." The tenth count also charges that defendants "knowingly violated and knowingly participated in, permitted and assented to" the violation of the statute.

From the beginning it has been our theory that the presence or absence of the defendant's signature in respect to any given report was immaterial. The approval of this theory by the Circuit Court of Appeals, and its subsequent approval by this court (*Jones National Bank v. Yates*, 240 U. S., 556) merely confirmed the theory of the declaration.

Specification of Errors.

This part of defendant's brief covers fifty-eight pages and contains much that is argumentative. It is almost impossible to answer these arguments paragraph by paragraph without greatly lengthening and confusing the argument. This is due to the difficulty of separating the argument from the mere enumeration and description of the rulings complained of, and also to the fact that there is no accurate grouping of subjects and in many cases no reference to the pages of the record. Inasmuch as this part of the brief is followed on pages 98 et seq., with a statement of the points relied upon and an argument in support of each, we will assume that the argumentative portions of the "specification of errors" are merely explanatory and that they are not relied on for reversal and will not be considered as requiring notice on our part unless they are plainly referred to in the argument proper found on pages 98 to 188, inclusive.

ARGUMENT.

The eighteen points enumerated by counsel on pages 98-103, will be referred to under the same numbers.

Point I—Jurisdiction. (Defendant's brief, pp. 103-108).

The jurisdiction of the court has never heretofore been questioned. The difference between this case and the case of *Herman v. Edwards*, 238 U. S., 107, is very plain. The *Herman* case involved "a mere assertion of liability on the part of directors for wrongs for which they might be responsible at common law." The present case is entirely based upon the provisions of the federal statute which first requires the making and publication of reports to the comptroller, etc., and later provides that every director who knowingly violates or permits or assents to the violation of the statute shall be held liable in his personal and individual capacity for all damages which any person shall have sustained in consequence of such violation. Without the federal statute we would have no right of action. Until the case of *Yates v. Jones National Bank* was decided after the commencement of the litigation in the state courts, the principles involved were so far from being definitely settled that it was still an open question whether a director in such a case could be held liable at common law for fraud and deceit. In *Yates v. Jones National Bank* this court held that there was no common law liability; and that "the exclusive test of liability" was furnished by the federal statute. It was even claimed in that case that the federal courts had exclusive jurisdiction. This court in recognizing the concurrent jurisdiction of the state courts did not thereby weaken the jurisdiction of the federal courts. If there was no jurisdiction in the case at bar then there was no federal question for review either in *Yates v. Jones National Bank*, 206 U. S., 158; *Thomas v. Taylor*, 224 U. S., 73, or *Jones National Bank v. Yates*, 240 U. S., 541.

If any authority is needed it is found in

Wyman vs. Wallace, 201 U. S., 230.

The present case like that of *Wyman v. Wallace*, was brought "to enforce a special right given by" a federal statute.

Point II—Demurrer to Declaration. (Defendant's brief, p. 115).

Counsel in that part of his brief devoted to the argument does not present any argument in support of his demurrer but merely states that "this is considered in the statement of the case and specification of errors." In the absence of anything more definite we can merely mention the principle grounds of demurrer all of which were overruled by the Circuit Court of Appeals.

The first and second grounds of demurrer (Rec., p. 20) are too indefinite to require notice.

The third and fourth grounds of demurrer are answered by the fact that the declaration alleges defendant's knowledge of the falsity of the reports and the fact that he knowingly violated the statute by permitting and assenting to their signing, attesting and publication. If this is true, it makes no difference whether he had anything to do with their "making up" or not, or whether he acted maliciously.

The words, "knowingly violated," are supplemented by the allegations that the discrepancies between the actual value of the loans and discounts and their value as listed in the report "were known" to the defendants and that the reports were "knowingly false" in the various particulars alleged (Rec., pp. 8, 11).

The fifth ground of demurrer refers to the third count, which was withdrawn (Rec., pp. 26, 380).

The sixth ground of demurrer refers to the fourth count, based upon the September report. Chesbrough's name was printed at the bottom of this report in one of its publications (Rec., pp. 11, 33). In regard to this report, the declaration charges that he "knowingly violated and knowingly per-

mitted and assented to the violation of the provisions of the act of Congress aforesaid by permitting and assenting to the signing, attesting and publication of said report" (Rec., p. 9). The allegations of the declaration are therefor sufficient to charge Chesbrough with a violation of the act in respect to the September report, whether he actually attested it or not. The attestation of the report is not an essential element of liability.

Jones Natl. Bank vs. Yates, 240 U. S., 541 (556).

The seventh ground of demurrer is aimed at the fifth count of the declaration, but is so indefinite that it is difficult to understand what it is intended to refer to. It is safe to say that it raises no question not argued elsewhere.

The eighth and ninth grounds of demurrer refer to the dividend counts which were withdrawn (Rec., pp. 26, 380).

The tenth ground of demurrer refers to the ninth count which was also withdrawn (Rec., pp. 26, 380).

The tenth count (which is attacked by the eleventh paragraph of the demurrer) combined all the previous counts, claiming that the different violations of the statute that had been counted upon separately, were all part of a conspiracy to keep the public in ignorance of the true situation, while defendants could sell their stock and that of their relatives and friends. Such a count is not bad for duplicity. A series of wrongful acts all aimed at a single result and contributing to the injury complained of may be counted upon collectively as producing that result.

Oliver vs. Perkins, 92 Mich., 304.

For a collection of cases from other states and the lower federal courts see 31 Cyc., 119, Note 76.

The objection that under this count, the cause of action accrued to the stockholders of the bank and not to the plaintiff is frivolous and is answered by a mere reading of the count.

The twelfth paragraph of the demurrer is also frivolous. It contends that because the bank had not been closed by the Comptroller of the Currency, it had been determined by that officer that plaintiff's allegations were unfounded. We never claimed that the bank was insolvent and all of our allegations might be true without necessitating the closing of the bank. Moreover, it is at least possible that the Comptroller and bank examiners might be deceived, and it is a novel claim that the action or non-action of an administrative officer should oust the courts of jurisdiction.

The thirteenth paragraph of the demurrer is a mere repetition of the preceding in different form.

The fourteenth paragraph apparently refers to the dividend counts which were excluded.

The fifteenth paragraph is answered by the fact that the statute expressly covers such a case by fixing a liability upon any director who participates in or assents to a violation of the act. There was much that defendants could have done or refrained from doing to protect the public if they had so desired, and even in so far as the concurrence of the board or a majority of the board was necessary, nevertheless if either defendant assented to or participated in the action or non-action complained of, he is individually liable by the express terms of the act, and it is not necessary to prove that he cast the deciding vote. If this were not true, liability could never be fastened upon any director. Under this head it is also claimed that the declaration does not allege that the directors knew or believed that the paper should be charged off. It does allege that they knew that the paper was worth \$200,000 less than its face value and that the publication of the report in which it was listed at its face value was a knowing violation of the law and that the report was knowingly false, both in this respect and also in that the bank had in fact no surplus fund and no undivided profits and had lost more than one-half of its capital. Anything more than this would be surplusage.

The sixteenth paragraph of the demurrer is too frivolous to require comment.

The last two grounds of demurrer (Nos. 17 and 18) are apparently based on the same claim, viz: that the allegations of knowledge in the declaration are insufficient.

Each count of the declaration alleges that the defendants "knowingly violated and knowingly permitted and assented to the violation" of the act. It is further alleged that the reports were "knowingly false," that the loans and discounts were worth and were known to be worth much less than the value at which they were listed, and that the reports were also knowingly false in that the bank had no surplus fund and no undivided profits and had lost more than one-half of its capital. Also that all the violations complained of were part of a design and conspiracy to deceive the public.

Even if the allegations of knowledge were confined to the two words, "knowingly violated," they would have been sufficient. Similar words have been held sufficient in criminal indictments requiring much greater precision than civil pleadings.

Dunbar vs. U. S., 156 U. S., 185 (192, 193).

Price vs. U. S., 165 U. S., 311.

Rosen vs. U. S., 161 U. S., 29.

This disposes of the demurrer. It was not only without merit in itself but it was also waived by pleading to the merits.

Stanton vs. Embry, 93 U. S., 548.

Campbell vs. Wilcox, 10 Wall, 421.

Point III—Defendant's Liability for Action of Board. (Defendant's brief, pp. 108-114).

All through defendant's brief the effect of Mr. Chesbrough's temporary stay in Chicago during the winter of 1902-1903 is exaggerated. Chicago is about twelve hour's ride from Bay City and is within easy range of communication by mail or telephone. Chesbrough came to Bay City to attend at least one director's meeting during the winter,—

that of November 21, 1902, when Maltby was before the board with his inventory (Rec., pp. 62, 277). He saw Mr. Collins at Chicago. If he did not know what was going on it was because he was deliberately attempting to create an alibi.

There is no trace of resemblance between this case and that of *Briggs v. Spaulding*, 141 U. S., 132. The latter was an action brought in behalf of the bank itself and was based upon the negligence of the officers and directors. It was a suit in equity and the court was discussing the facts. The liability of each officer or director necessarily depended upon the extent of his participation in the action or non-action complained of, and, in passing upon the facts, his presence or absence was a material factor. In the present case Chesbrough's visit to Chicago was a legitimate subject of consideration by the jury, and was presumably given all of the consideration which it merited. Its importance ended with the verdict. The charge of the trial court protected the defendant fully in this respect. The following are extracts from the charge:

"You have no right to take into consideration any act or negligence of the officers of the bank or either of them with reference to making or contracting of said loans to the Maltby Lumber Company, as the defendants nor either of them are liable to the plaintiff for any act of the bank's officers in the making or contracting of said loans. The directors in such a case are not excused merely, because they may have acted in good faith in making the original loan, nor are they liable merely because of their negligence then or subsequently, but the primary question is whether defendants caused or permitted to be made a statement of the bank's condition upon which plaintiff relied to his injury, and which they knew was materially false" (Rec., pp. 379-380). * * *

"The board of directors consisted of seven members at the time this transaction of which the plaintiff complains occurred. No two members or three members of the board would have the right or power to write off any part or portion of the loans and dis-

counts, and in order to write off any part or portion of said loans or discounts as uncollectible, it required the action of at least four members out of the seven members of the board of directors in favor of the same, and these defendants or either of them cannot be made liable for the failure of the other members of the board of directors to act in this regard (Rec., p. 381). * * *

"You cannot impute to these defendants knowledge of the affairs of the bank and of the Maltby claim, simply because they are directors. The knowledge to which I shall refer in this charge as being necessary to hold them liable must be actual knowledge (Rec., p. 383). * * *

"These defendants cannot be held liable because of their own bad management or negligence, or the bad management or negligence of any other director, officer or employe of the bank, nor because they did not give more of their time to the affairs of the bank, nor because they committed the actual management of the bank to others, nor for any mistake in judgment, nor misconduct of any kind or description on the part of any other person than themselves. I might continue at length telling of things for which defendants cannot be held liable, but I will cover them all by saying to you that they cannot be held liable in this case, except for the particular things and in the particular ways, I shall later specifically point out to you (Rec., p. 383). * * *

"If you find that any particular fact came to the knowledge of one defendant you are not to consider it as against the other defendant, but so far as the facts properly apply to each defendant, you have a right to consider such facts and circumstances as bear on the question whether defendants knew what it is claimed they knew in the years 1902 and 1903, at the particular time, in those years, alleged in the counts of the declaration submitted to you" (Rec., p. 384).

Points IV and X. (Defendant's brief, pp. 115-117).

These points are argued together by defendant's counsel on the theory that they both involve the question of the admissibility of documentary evidence in the absence of direct and positive proof that it was actually seen by Chesbrough prior to the transactions complained of.

We agree with counsel that defendant as a director was not charged with knowledge of what appeared in the books and papers of the bank. We have never claimed that he was and the charge of the court quoted above protected the defendant fully in this respect. The real question is whether all documentary evidence should have been barred until it was shown *in advance* that it actually came before the eyes of the defendant Chesbrough prior to the purchase of plaintiff's stock. The trial judge stated his position concisely as follows:

"For the benefit of counsel, I will say that I am trying the case on this theory, that the plaintiff is permitted to show these entire transactions through the bank, and then the part that these defendants or either of them took in the transactions and then as soon as that has been done, I will permit the jury to say whether or not at the time these reports were made or previous thereto, the Board of Directors should have charged off that or a certain amount of the Maltby claim and whether or not these defendants or either of them knew at that time or previous thereto that such amount or any portion of it should have been charged off and if a certain amount should have been charged off, and they knew it should have been charged off, was that report of the bank showing its condition brought to the attention of the plaintiff, and was the plaintiff thereby deceived and thereby induced to pay the price he paid for the bank stock" (Rec., p. 97).

The Circuit Court of Appeals had previously said:

"In the trial of this issue, the detailed history of the entire transaction and of each defendant's connection is, generally speaking, admissible as tending to show whether the loans were at the time in question in fact bad and whether each defendant knew that fact, but not as otherwise establishing any liability" (195 Fed., p. 880).

The trial judge repeatedly cautioned the jury against applying to one defendant any evidence which related solely to the other. The following are quotations from his remarks on this subject:

"I think, perhaps, in view of your objection, I should tell the jury that this case is of such a nature that under the law and evidence therein both defendants might be held liable, or neither be held liable, or either one be held liable without the other, so that the jury will at all times have in mind as to whether the evidence concerns one or both of these defendants and, if it concerns only one they need not consider it against the other. As the particular exhibit comes in, it is not always possible for the court to tell at that time whether it concerns one or both of the defendants. That is for the jury and they must keep watch of these things. Two very material things in this case are whether the claim of the bank against Maltby had any material value at that time and whether these defendants knew it. Of course, upon the question as to whether they knew it, there may be evidence against one or both, or against one and not the other, and if it is admissible against either one, the court will admit it in evidence. There might be a case where the directors are responsible for the report and one or both of the defendants may not have anything to do with it" (Rec., p. 32). * * *

"Of course, knowledge on the part of one would not be binding on the other, unless he, too, has the same knowledge. So that all the way through, you must try to find out what knowledge each of the individuals had. I think the statement which I have

made before, and can make again, will be sufficient for you to say each time when the proofs come in, which one of the parties had knowledge, which question you must consider from the testimony introduced. If this claim was worthless, and the two defendants did not know it, they would not be liable, but if they did know it was worthless they would be liable, but if only one knew that it was worthless, and the other did not have this knowledge, the former would be liable, and the latter not" (Rec., p. 33).

In admitting evidence of facts connected with one of the defendants alone, the trial judge made it clear that it should not be considered as against the other defendant (Rec., pp. 111, 112, 134).

The following are extracts from the charge:

"If you find that any particular fact came to the knowledge of one defendant, you are not to consider it as against the other defendant" (Rec., p. 384).

"If you should find for the plaintiff and against both defendants, but should find that the knowledge of the defendants in this regard was different, and that under the instructions already given you that plaintiff was entitled to recover less from one defendant than from the other, then you must return a verdict against both defendants for such lesser amount, and for no more" (Rec., p. 387).

"On many occasions in this charge I have referred to the defendants collectively. As to the question of what they knew about this transaction and what they thought and believed to be their duty and believed and thought ought to be done with reference to charging off a substantial portion of the Maltby claim to profit and loss at the time or previous to these certain reports in 1903, and what they then knew, thought and believed about their right to make the three dividends referred to under the tenth count, you must consider these defendants entirely separately. Knowledge on the part of one does not mean knowledge on the part of the other. You might find that they both

knew, thought and believed the same thing, or you might find that they did not" (Rec., p. 389).

This latter statement is found at the very end of the Court's charge and must have been one of the clearest impressions carried by the jury to the jury room.

It is plain that nothing more could have been done by the court to protect each of the defendants. It would have been absurd to exclude evidence tending to convict one defendant of fraud merely because it would not convict the other. It is manifest that in respect to transactions extending over many months, there was much competent evidence against both defendants in the nature of transactions which came equally to the knowledge of each, but at different times. To hold that the knowledge of neither could be proved unless acquired in the company of the other would be preposterous.

The theory of defendants' counsel was that, as each document was identified and offered, it was necessary to prove in advance by positive definite evidence, that it was actually submitted to each of the defendants as individuals. That until this was done, the evidence was incompetent.

An application of this theory to various important documents in the case shows its absurdity. For example, we will take the Comptroller's letter of October 21, 1902 (Exhibit 24, Rec., p. 70).

Chesbrough was not present at the meeting of October 24th, when the Comptroller's first letter was discussed by the board but he was present at the meeting of October 3rd, 1902 (Rec., p. 61), at which the bank examiner himself was present and presumably said in person all that the Comptroller said in his letter (Rec., p. 217). The Comptroller's letter refers to the report of this very examination (Rec., p. 70). Chesbrough himself testified:

"I think we got orders to reduce it (the Maltby line). If I remember right, we got orders from the Comptroller (Rec., p. 267). * * *

Q. When did you first determine to reduce the Maltby line? A. When our attention was called to the excessive line by the comptroller of the currency" (Rec., p. 269).

The Comptroller's second letter of May 13, 1903, was submitted either at the meeting of May 15, or May 22, at both of which both defendants were present (Rec., p. 65).

The letters received from the railroad companies during 1902 and 1903 were received and submitted to the board at different dates.

Andrews testified:

"The letters that were introduced in evidence that were received by the bank from different parties were filed with the letters of the bank. They were always open to the inspection of the directors and when they were received, before being filed away, they were referred to the board and those who were present saw them." (Rec., p. 108).

Chesbrough testified:

"I think I heard some of those letters read on the board, that have been referred to as having been received by the bank in answer to correspondence sent out by it, after the receipt of the letter of the Comptroller of October 21st, 1903; I heard them read at various times." (Rec., p. 263).

Under defendant's theory, these very letters should have been excluded because we could not prove definitely, before offering each, that it was actually seen by Chesbrough.

The correspondence, reports, and notices received by the cashier or other officers of the bank were not relied upon to support any legal presumption of knowledge on the part of the defendant but merely as circumstances showing opportunities for acquiring knowledge from which the jury might find that it was actually acquired. (See charge, Rec., p. 383). There was also much proof, in addition to the above

admission of the defendant himself, that the information referred to was actually brought to the knowledge of the defendants. Mr. Andrews testified:

“My custom was to report any additional information as I received it in relation to the account, to the board from time to time, and the condition of the account.” (Rec., p. 81).

Mr. Collins also testified that the Maltby account was a matter of “constant discussion” with “each and every one of the directors,” and that he distinctly remembered talking it all over frequently with both McGraw and Chesbrough. (Rec., p. 244).

It was also repeatedly shown, admitted, and argued by defendants’ counsel that in respect to all of the Maltby matters the board acted “as a unit.” (Rec., pp. 191, 207, 251, 264-5, 268, 328). It is a reasonable inference that they communicated to each other freely everything that they knew about the Maltby account. In this connection Chesbrough said:

“There was no difference in the action of myself and Mr. McGraw in reference to the Maltby Lumber Company from first to last as compared with the action of any other of the directors of the board. (Rec., pp. 264-5) * * * The board was always unanimous in reference to the various phases of the business about the Maltby paper.” (Rec., p. 268).

Mr. Chesbrough cannot attempt to hide behind the supposed good reputation of some of the other directors in this way, and at the same time escape being charged with the knowledge that they had in regard to the Maltby account.

The fact that the person making false representations had knowledge of the falsity thereof may be inferred from proof of circumstances showing the position occupied by such person in relation to the subject matter of the representations.

6 Enc. of Evidence, 64, citing cases from Georgia, Illinois and New York.

"The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the legitimate fact. It is enough if these may tend even in a slight degree to elucidate the inquiry or to assist though remotely to a determination probably founded in truth. * * * The modern tendency, both of legislation and of the decision of courts is to give as wide a scope as possible to the investigation of facts."

Williamson v. U. S., 207 U. S., 425 (451).

Holmes vs. Goldsmith, 147 U. S., 150 (164).

Hindman vs. Bank (C. C. A. 6th Cir.), 112 Fed., 931 (945).

Glaspie vs. Keator (C. C. A., 8th Circ.), 56 Fed., 203.

Walsh vs. United States (C. C. A., 7th Circ.), 174 Fed., 615 (Writ of Certiorari denied January 17, 1910).

"The difficulty in making proof of fraud is compensated to a certain extent by the courts in permitting a very great latitude in the range of the evidence. * * * It is said that if the evidence offered has any bearing on the question however remote it should be admitted."

3 *Elliott on Evidence*, Sect. 2134, citing,

Butler vs. Watkins, 13 Wallace, 456.

Lincoln vs. Clafin, 7 Wallace, 132.

Mutual Life Ins. Co. vs. Armstrong, 117 U. S., 591.

"The evidence of fraudulent transactions is rarely of a direct or positive character. The reason of this has been said to be that those engaged in such questionable transactions do not court the light of day. Very slight circumstances, therefore, may, although apparently trivial and unimportant of themselves, afford, when combined together, irrefragable proof of fraudulent intent."

3 *Elliott on Evidence*, Sec. 2136, and cases cited.

There are three modes of proving a state of mind.

1. Conduct or behavior.
2. External circumstances calculated by their presence or occurrence to bring about the state of mind in question.
3. A prior or subsequent state of mind.

Wigmore on Evidence, Vol. 1, Sec. 244, p. 304.

“Conduct or behavior. In this sort of evidence we argue from an observed effect—conduct—to the probable cause—a specific mental state. The basis of the inference is our experience of the operation of human nature. The general principle of relevancy applies, that the evidential facts should be received whenever the fact to be proved is at least a fairly possible or a probable inference though not the conclusive or the most probable one.”

1 *Wigmore*, Sec. 265, pages 330, 331.

“External circumstances as evidencing knowledge belief or consciousness. There are four kinds of circumstances which may point forward to the probability that a given person received a given impression.

1. The direct exposure of the fact to his senses of seeing, hearing or the like.
2. The express making of a communication to him.
3. Reputation in the community on the subject as leading to an express communication.
4. The quality of the occurrence as leading either to actual perception by his senses or to express communication.”

1 *Wigmore*, Sec. 245, p. 305.

Proof of knowledge or intent or of any other fact constituting a mere state of mind, must necessarily be proved not by showing that a given fact was actually communicated to the person involved, but by showing that he was in such a situation and location as to make such communication to him possible and probable. Having done this, it is

for the jury to determine from the actions of the individual whether the facts actually reached his consciousness. There was ample reason for determining this question in the affirmative in the case at bar and it would have been preposterous to require the defendant in each case to show an actual verbal communication of the facts to each of the defendants, prior to the introduction of the various documents. It must be remembered that none of the evidence complained of was relied upon to support a legal presumption of knowledge on the part of the defendants but these proofs were offered merely as circumstantial evidence of the existence of opportunities for acquiring knowledge, from which the jury might find that it was actually acquired. The jury had the right to infer that in a crisis of this kind each member of the board of directors would not keep his knowledge to himself, and that what was known to one would be generally known to all.

We might rely if necessary on the statement of this Court in *Thomas vs. Taylor*, 224 U. S., at page 82 to the effect that deliberate ignorance is equivalent to knowledge. This, however, is not necessary. The witness Andrews although he attempted to testify truthfully was naturally in sympathy with the defendants and therefore took refuge in a failing memory, with respect to what he actually said or showed to the defendants and other individual members of the board. To hold that plaintiff was compelled before introducing any piece of evidence to show a clear and distinct recollection by Andrews of the submission of this particular document to each of the defendants as individuals would have been preposterous.

Point V—Custom of Bankers. (Defendant's brief, pp. 117-118).

Counsel for defendant shows extraordinary persistence in referring to the question "whether bank directors exercise ordinary care." (Brief, p. 117-118). If that were the question at issue, the custom of other bankers might possibly have some bearing on the case, but in view of the fact that the entire theory of plaintiff's case and of the jury's verdict

was that defendants wilfully and knowingly violated the law, we cannot see how they would be helped by any proof of custom on the part of others.

Under counsel's theory, if all the banks in one city were managed illegally by their boards of directors, none of the directors could be held liable. They could set their own standards, and the violation of law by each would excuse a similar violation on the part of the others.

Points III and VII. (Defendant's brief, pp. 118-145).

These two points are combined in defendant's brief, but we do not see any possible connection between them. Point III was argued in defendant's brief (pp. 108-114), as a part of or immediately following the argument of Point I, but without any separate heading. We have, therefore, referred to it above, next following Point II. Point VII refers to the reports made to the comptroller. Its scope is not quite clear but it apparently involves two questions.

First, can a report be false if it corresponds with the books of the bank?

Second, was there sufficient evidence of plaintiff's reliance upon these reports?

As in all sections of defendant's brief, this section contains references to questions which are discussed more at length in other sections. It is impossible to make express reference to each repetition of incorrect statements of fact or discredited arguments which have been disposed of elsewhere.

*Can a Report be Considered False if it
Corresponds With the Books of the Bank?*

It seems almost unnecessary to present any elaborate argument on this subject. The correspondence between the report and the books of the bank, so far from excusing the defendant, was one of the links in the chain of liability. It was because the report did correspond with the books, because defendant knew that it would correspond with the

books, and because defendant knew that the books themselves carried and would continue to carry the worthless Maltby paper among the loans and discounts which would make up the "resources" to be listed in the published reports, that defendant can be held liable even in the absence of his personal attestation on any one of the reports. The Circuit Court of Appeals disposed of this question as follows:

"Under what is said to be the universal practice of national banks in making such reports, and under what the undisputed testimony shows to have been the regular practice in this bank, the making and publishing of the reports were the automatic results of the bookkeeping. Whatever the books and the daily statements showed the resources to be appeared as resources on the report. If a line of paper was carried at its face among the "loans and discounts" on the books, it would normally appear at that same amount in every one of the five reports in each year. Both defendants knew this. It follows that it is not important whether each did or did not attest each report (except so far as plaintiff's conclusion to buy might rest on the presence of a particular name at the foot of the report plaintiff saw). All directors who participate in and approve a long-continued carrying on the books, among the loans and discounts, of a line which they know is worthless, and in amount sufficient materially to affect the standing of the bank, are bound to know that under the practice prevailing in this bank such worthless paper will become an element of the published reports, and that these reports will in so far falsely represent to the public the bank's condition; and so, in a fair sense, such director permits the making of a report which is a violation of the act. Hence his primary duty here involved, and a breach of which causes a violation of the statute, is the duty to charge off assets which have become worthless." (193 Fed., 881).

The argument found in defendant's brief is a mere re-statement of the argument made in the Circuit Court of Appeals on the first hearing in that court. At that time we

made an elaborate argument in reply, discussing each case cited, showing that the authorities relied on did not in fact hold that a report to the comptroller was a mere inventory, but that on the contrary the decisions, both state and federal, held the contrary. Since that time this court has disposed of the question so definitely that no elaborate answer to counsel's argument and citations seems necessary.

In *Yates vs. Jones National Bank*, 206 U. S., 158, it was held that the statute by implication requires "that the report when made should contain a true statement of the condition of the association."

In the Nebraska litigation which furnished the foundation for the opinions of this court in both the *Yates* cases (206 U. S., 158, and 240 U. S., 541), there was apparently no allegation or proof of any variance between the reports and the books of the bank. In the third of the important decisions of this court on the subject (*Thomas vs. Taylor*, 224 U. S., 73), it affirmatively appears that the conditions were precisely like those in the case at bar, viz.: the directors included among the "resources" listed in the published report, doubtful assets which should have been charged off. The assets, of course, appeared on the books of the bank, and the books corresponded with the reports, but it was this very correspondence which caused plaintiff's loss and was the foundation of defendant's liability. In view of the opinion of this court the space given to this subject in defendant's brief is wasted and it would be a still greater waste of space to reply to these arguments in detail. The Ohio case of *Mason vs. Moore* from which such voluminous quotations are made, merely held that in a common law action for deceit a director might be held liable for negligent ignorance even in the absence of fraudulent intent. How this case helps the defendant here or what bearing it has on the present issues we cannot conceive. The other cases cited are almost equally out of place and need no further mention.

Plaintiff's Reliance.

Plaintiff's testimony at Saginaw in the trial of the Smalley case, which contained the phrase "regardless of their value," was fully and satisfactorily explained not only at Saginaw (See Rec., p. 44), but also on both the first (Rec., pp. 44-45), and second (Rec., pp. 38-39) trials of this case. He testified on the second trial, "I thought that the value of the loans and discounts depended upon the live paper, supposed and carried as good." (Rec., p. 38). Even upon the Saginaw testimony alone, the Michigan Supreme Court held that the question of his reliance was a question for the jury.

Smalley vs. McGraw, 148 Mich., 384 (at page 393).

On the present record the facts in regard to plaintiff's reliance upon the reports and upon his belief that they listed among the loans and discounts only such paper as was "supposed to be good" were reiterated many times without dispute. (Rec., pp. 27, 31, 32, 34, 37, 38, 39, 41).

It has been uniformly held that a witness may testify directly as to his reliance upon certain facts when that question is material.

6 *Ency. of Evidence*, 72. Citing cases from many states.

Plaintiff also testified:

"I don't remember all who signed the first report upon which I invested my money. It made no difference; I knew that it was signed by reputable directors; I knew those directors met every week. I knew that Mr. Andrews' statement was made from books of the bank on that day and I knew that the statement signed was signed by three directors called in to sign for the reason that the law requires that it be signed by three of the directors." (Rec., pp. 39-40) * * *
So it did not make any difference to me whether this director or that director signed the report. I did not

pay a bit of attention to it. I was governed by what the report reported. * * * (Rec., p. 41).

Q. If the statement shown you by Mr. Clift, had not been signed by any director, would it have made any difference to you? A. It certainly would, for it would not have been a legal statement, as the law requires such statements to be signed by three directors.

Q. You have stated again and again, during the cross-examination, that it made no difference to you what director attested the statement, or whether any director attested it? A. I didn't say that.

Q. Did it make any difference in this report whether any director attested it, or who attested it, that is, did it make any difference to you? A. Yes, if it had not been so attested I would not have considered it true, and it would not be a legal statement. * * * (Rec., p. 42).

Q. Will you say what you meant by saying it did not make any difference to you?

A. It didn't make any difference to me which three of the bank, signed the statement. I knew all the directors personally, and all were reputable business men." (Rec., p. 47).

The fact that plaintiff relied on each of the reports (Rec., pp. 27, 31, 32, 34) and was also influenced by the information given him by Mr. Andrews in regard to the continuing correspondence between the reports and the books on the dates when he made his first and last purchase of stock (Rec., pp. 34, 35, 39), and also by the fact that the stock was paying five per cent semi-annual dividends (Rec., pp. 27, 35, 39), was not only supported by sufficient evidence to make it a question for the jury but was practically undisputed. Plaintiff summed up the situation by saying:

"Mr. Andrews' statement differed from Mr. Clift's (the newspaper clipping of the published report) only in the additions to the interest and discount items—what they had made in the month which had passed. It was a month later. Mr. Andrews' statement showed a little better than that of Mr. Clift's and gave

more details. I did not buy the stock on the statement of Mr. Andrews but relied strongly on the other. I asked Andrews for his statement to find the losses out. I did not rely entirely on the other statement until after I had seen Andrews. * * * I had confidence in the men who signed the statement. It looked good and paid dividends. There was nothing in the statement about the dividends, but Mr. Clift (the broker) spoke about them." (Rec., p. 39).

Claimed Efforts to Unseat McGraw and So-called First National Bank Pool.

This entire question is really immaterial, but it is so persistently and frequently mentioned in defendant's brief that we do not feel justified in ignoring it.

As a matter of fact, the plaintiff Woodworth had no connection whether with the so-called "First National Bank pool," never owned a share of stock in the First National Bank, and knew nothing about the desires of its directors. So far as the effort to unseat McGraw was concerned, it had its inception in 1904, almost a year after plaintiff bought the last of his stock. It was the result of McGraw's having been discredited by reason of his stock sales, and also of the desire of very much large stockholders to displace the men who had disgraced themselves and the bank, and to replace them with representatives of those whose holdings were then larger. Mr. Woodworth actually bought the stock as an investment and for no other reason. The following is a summary of the testimony in the record on the subject of the so-called First National Bank pool:

The plaintiff Woodworth testified that he never tried to buy Lamont's stock and never talked with Mr. Charles A. Eddy (the claimed head of the so-called pool) until after plaintiff had purchased his last stock. (Rec., p. 37).

Mr. Clift, the broker, testified that he went to Mr. Woodworth to sell him the stock because he regarded him as a retired lumberman and thought that he might have

some money to invest. That he knew of no connection whatever between the plaintiff and Mr. Eddy or the so-called pool and knew of no plan to oust McGraw as a director. That he showed plaintiff a newspaper clipping of the published report of the bank because he had it in his pocket for the purpose of showing it to anyone with whom he might be negotiating for the sale of the stock. (Rec., pp. 136-137).

Mr. Andrews, the cashier, testified that he knew nothing about any "First National Bank pool." That he never heard anything to indicate that plaintiff was attacking McGraw personally or trying to get him off the board. (Rec., pp. 170, 171, 173).

Defendant McGraw first testified that he sold his stock because he heard in 1903 that he was going to be dropped from the board. (Rec., pp. 189, 190), that he was told by Lamont that there was a disposition to remove him from the board and that Woodworth had solicited his proxy but did not get it. (Rec., pp. 195, 196).

The next day McGraw had apparently forgotten his direct examination and testified as follows on cross-examination:

"Q. Why did you sell you stock? A. Because I needed the funds.

Q. Is that the only reason? A. Yes, sir.

Q. Why—haven't you testified that you sold your stock because you thought you were going to be dropped off the board? A. That is understood. I didn't testify to that.

Q. What is the reason you now testify the only reason you sold the stock was because you needed the funds? A. I will withdraw that. I needed the funds and I sold that stock because I understood I was going to be dropped off the board. Those are the two reasons I sold the stock." (Rec., p. 213).

Chesbrough testified that he knew nothing about any "First National Bank pool" or any plan to remove McGraw as a director. That in fact he was not removed until 1905. (Rec., p. 267).

The evidence above summarized was the only evidence on this subject. There is not a word of competent evidence to connect Mr. Woodworth with any of the facts which are supposed to be important, while the facts themselves were merely introduced as a subject of rumor and were never proved. No pertinent evidence was offered and nothing material or competent was excluded. The subject does not justify any further consideration on this hearing.

Point VI—Dividends. (Defendant's brief, pp. 145-146).

This question was disposed of as follows in the first opinion of the Circuit Court of Appeals:

"If dividends were declared which defendants knew must be paid out of capital stock and not out of the existing surplus earnings, that would be material in establishing plaintiff's substantial asserted grievance; i. e., that defendant's participated in, or assented to, so conducting the bank's affairs as to maintain, knowingly, a fictitious market valuation upon the stock. We can find in the record no ground for a jury to conclude that any one of plaintiffs purchases materially depended upon any one dividend declaration, and counts 6, 7 and 8 were properly withdrawn; but count 10 as we think states, in its terms and by reference, and in a sufficiently unitary way, what we have described as the substantial asserted grievance, and under this count evidence of the dividends might be pertinent." (195 Fed., 883).

Upon the second trial the three dividend counts were again withdrawn from the consideration of the jury and the jury was charged as follows:

"The testimony in regard to dividends may be considered by you only in connection with the tenth count, and plaintiff is not entitled to a verdict even under the tenth count, because of the dividends alone." (Rec., pp. 383-4).

The dividends were therefore excluded as a substantive cause of action and permitted to remain merely for their evidential value in connecting the publication of the various reports as part of a common design.

The record raises some other questions connected with the subject of dividends, all of minor importance.

The mere fact that defendant may not have been present when any particular dividend was voted by the board of directors is unimportant. He knew that dividends were being declared and paid because he was receiving these dividends on his own stock. He made no protest and no effort to prevent the payment of further dividends. Although he was not present at the meeting of May 29, 1903, when the dividend was voted, he was present at the next meeting, that of June 5, 1903, and heard the minutes of the last meeting read and approved. (Rec., p. 65). He was also present on November 27, 1903, when the last dividend was voted (Rec., p. 68).

The admission of proof in regard to the payment of dividends (with explanatory instructions as quoted above) was manifestly proper. Defendants' counsel recognized this fact by offering as an independent part of their own case a complete statement of the dividends paid for a period of six years as found in the former record. (Rec., p. 268, brief, pp. 62-63).

Defendant's counsel erroneously states that this evidence was offered by plaintiff. The list was prepared and offered by defendant's counsel who then noticed that there was one dividend which he did not care to put in and plaintiff's counsel then announced that they would put it in and the court permitted them to put it in at that time as a matter of convenience. (Rec., p. 268).

It is not true as stated by counsel that the dividend of November 27th, 1903, was declared after plaintiff had bought his stock. The greater part of plaintiff's stock was bought on December 16, 1903. (Rec., p. 34). The record evidence in regard to the passing of former dividends (Rec., pp. 255-

256), was offered merely in connection with the cross-examination of defendants' witness Collins by whom defendants' counsel had attempted to prove the facts in regard to the dividends by recollection (Rec., p. 244). The records were introduced to correct the witness' faulty memory. (Rec., p. 255). The daily statements of the dividend dates were properly offered for the purpose of showing that the surplus and undivided profits on hand would not have been sufficient for the declaration of the dividends from anything but the capital of the bank, if the Maltby paper known to be bad had been first charged off. Any other questions mentioned by counsel in connection with the dividends were, at the most, questions for the jury.

Point VIII—Opinion and Belief of Other Directors. (Defendant's brief, p. 160—by a typographical error, headed "Point VII").

This question may be disposed of by a simple explanation of the rules adopted by the trial judge which were as follows:

The defendants themselves were permitted to state what they believed, what was said to them, what their motives and intentions were, whether they acted in good faith, and even what they supposed, in short, they were given unlimited latitude in respect to questions which would ordinarily be excluded as conjecture or hearsay, provided that the inquiry was directed to something affecting the minds of the defendants themselves. This, of course, was on the correct principle that the defendants' state of mind was an important question in the case.

The other directors were permitted to state what they did, and what others did, what the assets consisted of, their value, etc., etc., but were not permitted to state what they thought or believed or were informed or why they acted as they did. These rulings were, of course, upon the correct theory that the condition of mind of the other directors, not defendants, was not a material subject of inquiry.

Neither defendants nor the other directors were permitted to conjecture as to what others thought or believed.

This subject was disposed of as follows by the Circuit Court of Appeals on the second hearing in that court:

“Several assignments of error raise in one form or another the theory that defendant could be liable under the declaration only for the affirmative action of the board, or only if the board as a body did or omitted something against the duty of the board as a body. In the main, these contentions are sufficiently disposed of by the previous opinion; but they present also the specific complaint that the other directors, not defendant, were not allowed to testify that they personally believed the Maltby paper to be well enough secured, so that it was mostly good. The issue was, in this particular respect, not what they believed, but what Chesbrough believed. It often might well be that what one director believed would have some relevancy, in a popular and even in a legal sense, upon the question of what another director believed; but that cannot be the rule, in a situation like this. The conclusion which a director would form about the value of the Maltby assets would depend upon many elements,—among them (1) the extent to which his personal confidence in Maltby was impaired; (2) the extent of his knowledge about the assets and from other sources than Maltby; (3) his expert knowledge of this particular branch of lumber business, and his resulting skill in valuing the assets of a going business; and (4) his individual tendency to look on the bright or the dark side of the matter. Perhaps it could be assumed that Chesbrough was in the same situation as the other directors as to the second above recited element; there can be no such assumption as to the other three. We think the trial court was right in confining the testimony of the other directors to their acts, and in refusing to permit them to declare their state of mind” (Rec., p. 419).

Point IX—Charging off Paper. (Defendant's brief, pp. 146-153).

This is the heading found in the "Statement of Points." The argument under this heading refers to many different subjects of which some have been already discussed, and others should have been discussed, if at all, in the argument to the jury. Only the following seem to require mention:

Plaintiff's testimony explaining the reason for charging off only \$135,000 in January, 1905, was not primarily designed (as claimed by counsel) to establish defendants' liability, but was designed to meet defendant's attack upon plaintiff's action in attesting the two reports in 1905. This subject had been elaborated on cross-examination (Rec., pp. 37-47) and the testimony now objected to was offered on re-direct examination (Rec., p. 48) and was in the nature of rebuttal. This would have made it competent if its competency were otherwise doubtful. As a matter of fact the whole amount charged off by the bank because of conditions existing in 1902 was \$226,000 of Maltby paper (Rec., p. 103) and \$73,000 of Brotherton paper (Rec., p. 48), making a total of \$299,000.00. Plaintiff waived the right to recover for \$99,000.00 of this sum and limited his recovery to his proportion of \$200,000.00, on the ground that the directors at least knew that the loss would amount to this sum. The Brotherton paper was mentioned incidentally, and was a necessary element in the explanation of the fact that no more of the Maltby paper could be charged off in January, 1905. No recovery was sought or obtained in regard to the Brotherton paper and the name of Brotherton was not mentioned during the trial except on this one occasion. The recovery was limited to plaintiff's proportion of \$200,000.00 and eliminated all questions involving the other \$99,000.00 of which sum the Brotherton loss formed a part.

The exceptions to the rulings on the admission and rejection of oral testimony, which are referred to here and elsewhere in defendant's brief may be explained as resulting from the failure of defendant's counsel to distinguish be-

tween the latitude which is properly allowed on the cross-examination of a party accused of fraud, and the strictness with which leading, suggestive and immaterial questions should be excluded when counsel is examining his own witness.

It is a general rule that the rulings of the trial judge in limiting or extending the limits of cross-examination are matters of discretion and not reviewable.

Wills vs. Russell, 100 U. S., 621.

Fourth Nat'l. Bank vs. Albaugh, 188 U. S., 734.

The same is true in regard to rulings on alleged leading questions.

Eli Mining & Land Company vs. Carleton (C. C. A., 8th Circ.), 108 Fed., 24.

The argument that nothing should be charged off except statutory "bad debts," is absurd. In this case the interest was paid on this worthless paper by discounting other worthless paper. The actual value of the paper was not increased by this process, and if defendants knew that it was worthless they are not excused because, by this subterfuge, they helped to give it an appearance of value.

The quotation from *Cassidy v. Uhlman*, 170 N. Y., 538, is from the dissenting opinion. The majority of the Court held that the defendants should have made an attempt to do something and then if their attempt had been frustrated by the action of the other directors they themselves would have escaped liability. In the present case defendant boasted of the fact that the directors acted unanimously and that his action differed in no respect from that of the others.

Point X.

This was grouped with Point IV in defendant's brief (p. 115) and also in this brief above.

Point XI—Maltby Inventory and Disposition of Maltby Assets. (Defendant's brief, pp. 160-162).

In counsel's "statement of points" this point (p. 100) refers only to the questions of the accuracy of the Maltby inventory and whether the loss sustained on the Maltby paper was due (as we claim) to the fact that the inventory itself was inaccurate and fraudulent, or (as defendant claims) to some mismanagement in the process of selling the assets.

Under this same heading in counsel's argument (pp. 160-162) he says little about these questions, but discusses the materiality of the evidence showing the secrecy which accompanied Lewis' employment in the Maltby office. The latter question requires no argument. The testimony had a legitimate bearing upon two questions: First, the defendant's desire to conceal the facts from the public during the time that plaintiff was buying his stock; and second, the fact that this concealment was successful as bearing on plaintiff's knowledge of the situation when he made his purchases.

Counsel's reference to Chesbrough's absence in Chicago is met by Chesbrough's own testimony as follows:

"I knew about Mr. Lewis going in the office of Maltby at about the time he went into the office" (Rec., p. 264).

The only question mentioned under this heading which demands any extended discussion is the question raised in respect to the Maltby inventory and the disposition of the Maltby assets.

So far as concerns the inventory itself we refer to pages 26-33 of our former brief. The real question before the defendant as a director of the bank was not what the Maltby assets were worth, but what the Maltby paper was worth. He was bound to take into consideration not only the errors and discrepancies in the inventory itself but also the inevitable shrinkage through liquidation. This was also discussed in our former brief.

So far as concerns the method of disposing of the Maltby assets defendant's criticism was definitely based on the claim that the bank should have given Maltby *more latitude and more time* to dispose of the assets.

When Lewis first went into the office he merely took care of the finances for which he was very well qualified. He had had wide experience as an accountant (Rec., p. 110). McGraw testified that Lewis was honest and capable (Rec., p. 207).

The actual work in the woods, etc., was still under the control of Maltby and his experienced employes (Rec., pp. 110, 111, 119), who in turn were closely watched and controlled by the directors of the bank (Rec., pp. 108, 109, 118, 119), some of whom, including the defendant and McGraw, were practical and experienced lumbermen (Rec., p. 110). Maltby remained as an employe of the bank giving his best attention to the business for more than a year and a half and until after the Maltby Cedar Company was organized by the bank (Rec., p. 124). From that time forward the directors of the Maltby Cedar Company were in control (Rec., p. 363), *the defendant Chesbrough having continued as a director of this company up to the time of the trial.* (Rec., pp. 124, 125). Under the directors was Lewis, who had gradually acquired a fair knowledge of the details of the business, while under Lewis were efficient practical men in charge of the woods operations. (Rec., pp. 110, 119, 124). Recognizing the fact that Maltby was the best man whom they could get to market the personal property, he was left in charge of that feature of the business until his services were dispensed with in 1904, by which time the other employes of the bank had learned all that was necessary to dispose of the remaining assets. Maltby's activities were in no way limited except that he was prevented from buying property or taking new contracts. (Rec., p. 118). The business in general was being liquidated.

The following quotations from the record explain the situation.

Lewis testified:

"Q. Before the organization of the Maltby Cedar Company, who in behalf of the bank had to do with the Maltby matter in particular? A. The board of directors. I got my instructions from them, Mr. Maltby received his instructions from the board of directors, but he had a free hand, except as to the expanding of the business, which was supposed to be closed out as fast as it could be. They possibly bought some small stock in order to close out stock which they had on hand to fill them in. Mr. Maltby was not controlled in any way in respect to the marketing of the property, but I handled all the proceeds from the sale, depositing them in the bank, and taking care of any papers in the bank.

Q. Were there ever any cases, where your stock of personal property, poles or ties, became so broken that there were not enough to sell advantageously?

What did you do in cases of that kind so long as the business was active? A. Tried to replenish them, so as to sell the old. During that time, there was some new business.

Q. What was the object in view of the new business?

A. The object of closing out the business to the best advantage" (Rec., pp. 118-119).

"We did not expand any, we attempted to get off timber where there were timber rights on the land and to realize on them. Each year's business was smaller than the preceding year's. We were just simply closing out" (Rec., p. 125).

"After Mr. Maltby transferred all of his property to the bank, he was given a free hand; that is, he was not hampered in taking care of the business, so as to close it out; the only thing he was hampered in, was the extension or the enlargement of the business, which was supposed to be closed out as fast as possible" (Rec., p. 128).

"Mr. Maltby had charge when the Maltby Cedar Company was organized; I cannot recall the date he left; after he went away, I had charge of the sales

under the direction of the board of directors; we advertised these poles and ties and shingles for sale in papers that carried that kind of advertising of the poles and ties and such stock as that. * * *

"The business was being curtailed as fast as it could; no new contracts were made" (Rec., p. 363).

Director James E. Davidson, one of defendant's witnesses, testified:

"Q. Did the bank, when it took over the Maltby business, did it go on and carry on the business just as Maltby had been doing, before carrying out his contracts, making new contracts, and carrying on the business as a going concern? A. Oh, no, it was for the purpose of realizing what they could. The bank took the position of realizing on the property as speedily as they could" (Rec., p. 237).

Maltby testified:

"I managed the business for the bank for about a year afterwards at a salary; in some cases, during that year, I followed my own judgment, but in a good many I followed the directions given me by the bank; I was curtailed to a great extent by the directors of the bank; I was curtailed in the way of cutting down the business,—cutting down the business in not being able to buy stock and turn it over—take new contracts; the business was conducted differently from October, 1902, from what it had been conducted the previous year in that the bank had a man in charge there at the time" (Rec., p. 320).

"I don't know that the business being curtailed affected the disposal of the property so much, but we were not able to buy other property,—ties and poles; it was the intention to close out the business rather than to keep it a going concern; and when I speak of a curtailment it was because of its being closed out; it was the intention to close it out instead of continuing the business" (Rec., p. 321).

"After that time, which was in 1903, they left, to a certain extent, the management of the properties to

me, that is, just the closing out of the business—winding up of the business; they had to consent to everything that was done; I don't remember selling any lands during the year that I was in the employ of the bank; from the time Mr. Lewis went into the office, he had charge of everything there—opened the mail; I did not handle any of the moneys that came in after that" (Rec., p. 322).

Maltby also testified (somewhat incoherently) to the effect that he had no criticism of the manner in which the property was sold. He first thought that some lands were sold for less than their value, but finally said that he did not know. He admitted that all the cedar (representing all of the forest products) was contracted for at fixed prices, and that therefore there was no unnecessary loss in that respect. He claimed that the loss resulted from not *buying additional property to fill existing contracts*. (Rec., p. 341). He continued:

"Of course, to go on and fill them, would necessitate the keeping on of the business, buying more material and buying more lands.

"Instead of keeping this as a going concern and working out all of my contracts, they simply sacrificed it and got what they could out of it, lands and all" (Rec., pp. 341-342).

On account of some of the property consisting merely of timber rights, and because of the personal property being so widely scattered and in such broken lots (Rec., pp. 107, 108, 206, 236, 237, 294-318), it necessarily took the bank a number of years to dispose of the assets, and the account was not yet closed at the time of the first trial in 1909, more than six years after the property had been turned over by Maltby. It was considered closed at the time of the second trial (Rec., p. 103), although there were a few small matters not yet disposed of (Rec., p. 119). One would naturally suppose that the criticism, if any, would have been that the bank did not dispose of the assets rapidly enough. The claim that the bank should have given Maltby *more latitude and more time* and should have not only continued to leave

several hundred thousand dollars of its money tied up in a business which had already resulted in a known loss to the bank of more than \$200,000.00, but should also have put *more money* into the business is quite extraordinary. Any national bank which would attempt to carry on such a business any longer than was absolutely necessary for purposes of liquidation would be very properly censured. The responsibility for the course followed in this case rests to a large degree upon Chesbrough himself as a director of the bank and of the Maltby Cedar Company, and he cannot be permitted to take advantage of his own mistakes, if any. We believe, however, that the course adopted by the bank in permitting Maltby to temporarily manage the sales department of the business, while at the same time depriving him of all control over the finances, and limiting his activities to the curtailment and closing out of the business at the earliest possible date, was the only reasonable course to pursue, and that this course is not a proper subject of criticism either by ourselves or by anyone else. The facts shown in these respects together with the opinions expressed by those qualified to give opinions, that the property was disposed of to the best advantage and brought all that it was worth (Rec., pp. 104, 119, 120, 121, 126, 127, 370) and that all the net receipts were applied on the Maltby indebtedness (Rec., pp. 105, 120) are sufficient to dispose of this subject.

The trial judge charged the jury as follows:

“The question of the manner in which the bank disposed of the Maltby assets is important only as it may throw light on the actual value of the Maltby paper at the particular dates, in 1902 and 1903” (Rec., p. 385).

Point XII—Defendant's Right to Rely Upon the Honesty, Integrity and Ability of the Bank's Employees.

We cannot find any reference in defendant's brief to this point, except its enumeration with the others on page 101. It might have some importance in an action for negligence,

but not in a case like this where guilty knowledge was charged and proved. In the present case, the trial judge charged the jury as follows:

"You cannot impute to these defendants knowledge of the affairs of the bank and of the Maltby claim simply because they are directors. The knowledge to which I shall refer in this charge as being necessary to hold them liable must be actual knowledge.
. . .

"These defendants cannot be held liable because of their own bad management or negligence, or the bad management or negligence of any other director, officer or employe of the bank, nor because they did not give more of their time to the affairs of the bank, nor because they committed the actual management of the bank to others, nor for any mistake in judgment, nor misconduct of any kind or description on the part of any other person than themselves. I might continue at length telling of things for which defendants cannot be held liable, but I will cover them all by saying to you that they cannot be held liable in this case, except for the particular things and in the particular ways I shall later specifically point out to you" (Rec., p. 383).

Point XIII—Denial of So-called Right of Cross-examination under Michigan Statute. (Defendant's brief, pp. 167-169).

This so-called right of cross-examination, involved nothing but the right to ask plaintiff leading questions, in respect to a matter not covered by his direct examination. It had nothing to do with plaintiff's competency as a witness and had really nothing to do with the Michigan statute. In the Michigan state courts the right of cross-examination has never been limited to the subject matter of the direct examination, and the statute was not designed or needed to broaden the scope of an ordinary cross-examination, but was intended to give one party the right to call the other for "cross-examination" even though he had not been sworn

as a witness in his own behalf. The plaintiff in the present case was sworn both in his own behalf (Rec., pp. 27-49) and also in behalf of the defendant (Rec., pp. 289-290).

Defendant's counsel twice claimed the right to "cross-examination under the statute." The first time (Rec., pp. 154-155) apparently the only object sought was to show that plaintiff was the mayor of Bay City in 1903. We had no objection to the proof of this fact and it was later proved without objection by the witness, Andrews (Rec., p. 158). The second time (Rec., p. 368) the desired question was actually asked and answered, and counsel is apparently creating a grievance out of the fact that it was called "direct examination" instead of "cross-examination."

The whole subject is trivial. It is elementary that the rules of cross-examination in the state and federal courts differ and also that questions of this nature are discretionary and not subject to review (see cases cited above). The context also shows that we offered to permit defendant's counsel to continue the cross-examination of the witness in respect to any subject which had been inadvertently omitted, but objected to the intentional postponement of a part of the cross-examination (Rec., pp. 154-155). The statement made by plaintiff's counsel on page 368 of the record and quoted on page 84 of defendants' brief contains a typographical error. Instead of the statement "this is a new statute," it should be "This is a new subject."

Point XIV—Evidence of Facts Subsequent to November 17, 1903.

This point is argued in three different parts of defendant's brief (pages 153-157, pages 162-163 and page 169). Part of the argument on pages 153-154 has been answered under Point IX. Part of the argument on pages 156-157 is concerned with the right to sue two out of seven directors which has nothing to do with this point but belongs (if anywhere) under Point XV.

The only question properly involved in Point XIV is the question whether the trial judge should have excluded evidence of all occurrences of every kind subsequent to November 17, 1903, which was the date named in the last published report of that year.

Defendant's counsel apparently misunderstands the opinion of the Court of Appeals on the motion to modify. He assumes that the court held that no evidence of any transaction, or event subsequent to November, 1903, was admissible in evidence. That part of the opinion referred to is the statement on page 888 of volume 195 of the Federal Reporter, to the effect that "the defendant's liability cannot be estimated as of this date (December 16, 1903). Their latest act which was constructively a representation of fact by them to plaintiff was during the previous month."

The above language is entirely misconstrued. This part of the opinion referred to the Brotherton paper. The original opinion had been slightly ambiguous in that it first stated that the verdict as to the Brotherton paper was unsupported with reference to defendant's knowledge "at a date earlier than that of the November, 1903, report" (opinion, par. 14, 195 Fed., 884), and afterwards stated that a verdict should have been directed on the Brotherton items. We claimed in our motion for modification that the loss on the Brotherton paper was recoverable at least with respect to the last report, and plaintiff's last purchase of stock which was made on December 16, 1903, only three days before the Brotherton failure was made public. What the Court meant was that defendants' liability on this last purchase must be estimated *with reference to their knowledge* on November 24th when the last report was published, or on November 27th, when the last dividend was declared, not on December 16th when the stock was purchased. They nowhere said that an arbitrary line must be drawn on November 24th or November 27th, and that all testimony referring to anything which occurred after that date must be excluded. Such a rule would lead to absurd results as was discovered by defendants' counsel while attempting to be consistent with his own theory. In the very act of making a motion to "strike out of the case anything relating to

anything after November 17th, 1903," he added, "with the exception of the two reports signed by Woodworth of January and May, 1905" (Rec., p. 373, defendant's brief, p. 155). He found himself in the same situation when he offered in evidence his statement of dividends (Rec., p. 268, defendant's brief, pp. 62-63). Counsel is incorrect in stating that this statement was offered by plaintiff. It was offered by defendant, and after offering it, defendants' counsel realized that proof of the last dividend mentioned in it was inconsistent with his own theory, that no facts should be proved subsequent to November 17, 1903. He therefore, attempted to withdraw this one item of his exhibit. The Court then merely permitted plaintiff's counsel to consider this item as offered by plaintiff so as to make the list of dividends complete (Rec., p. 268).

The cross-examination of Chesbrough in regard to the Maltby paper carried in 1904 was designed solely as an attack upon the credibility of the witness and the consistency of his testimony. Plaintiff's counsel expressly stated, "We do not claim any liability as to what he did in 1904. It simply goes to the credibility of the witness" (Rec., p. 283). An examination of the context will show the reason for pressing the cross-examination to this point.

In regard to the Maltby assets, the jury was told:

"The question of the manner in which the bank disposed of the Maltby assets is important only as it may throw light on the actual value of the Maltby paper at the particular dates in 1902 and 1903 (Rec., p. 385).

Under the heading XIV, on pages 162 and 163 of defendant's brief, counsel discusses the question of defendant Chesbrough's knowledge of the McGraw report. Although this has nothing to do with point XIV, we will dispose of it here.

Chesbrough's Knowledge of McGraw Report.

It was shown beyond question that the Maltby inventory was submitted to the board of directors at the meeting

of November 21, 1902, when Chesbrough was present (Rec., pp. 102, 205, 260, 276, 277, 331). The minutes of this meeting as well as those of all the other meetings, fail to show occurrences of this character. It was explained and conceded by all parties, that it was never the custom of the board to enter on the minutes all the business transacted at the meetings (Rec., pp. 110, 200, 201, 202, 203, 265). Some of the most important decisions in the Maltby matter never appeared upon the minutes. It is therefore difficult to decide the exact date of the meeting at which McGraw's report was submitted. He testified that he made his investigation about ten days after Maltby submitted his inventory to the board. That he was absent examining the property about ten days or two weeks and made his report immediately on his return (Rec., p. 217). Later he said that he made his report about two weeks after Maltby made his statement to the board (Rec., p. 223), and finally fixed the date of the report as about the middle of December, 1902 (Rec., p. 226). There was at a date not fixed a special meeting of a *committee of the full board* at which Maltby appeared (Rec., p. 191). The use of the word "committee" indicates that this was not a regular board meeting. There were many special or informal meetings held to discuss the Maltby affairs, both at the bank and at Mr. Collins' office (Rec., pp. 216, 244, 249). Lewis "often talked with McGraw and Chesbrough and often in Mr. Collins' office" (Rec., p. 119). Chesbrough admitted being present at a meeting where Maltby and the bank's attorney, Mr. Collins, were present "about the first of the year 1903" (Rec., p. 264). After a hint from his counsel he qualified this statement (Rec., p. 264) but the jury were entitled to consider the original statement as well as its qualification. McGraw testified that he "acquainted the entire board orally" with the conditions referred to in his written report (Rec., p. 207). He also testified that when he submitted the written report to the board "the entire board was there; we went over it. . . . I was sent to ascertain the facts. I got them as well as I could and submitted them to the entire board" (Rec., p. 225). Again, after a hint from his counsel, he stated that he could not say that every man was there (Rec., p. 225), but the jury had the right to consider his original statement at its face value.

Moreover, even if there had been nothing to enable the jury to find that Chesbrough was at the meeting when McGraw first submitted his report, there was ample evidence to support the conclusion that he learned of its contents in December, 1902. McGraw testified that the bank's attorney, Collins, was at the meeting when his report was submitted, which was about December 15th (Rec., p. 226). Mr. Collins testified that he went to Chicago to investigate the accounts there on the 23rd or 27th of December, 1902 (Rec., p. 244). While in Chicago he met Chesbrough and "informed him of my business and he gave his attention to it afterwards and later, from time to time" (Rec., p. 239). Mr. Collins further testified:

"When I would meet directors at other places than at the office of the bank, the subject matter of the Maltby account was undoubtedly under discussion. That applies to each and every one of the directors. I distinctly remember talking it all over frequently with both McGraw and Chesbrough from October, 1902. I talked the matter over with McGraw and Chesbrough. In December I met Mr. Chesbrough in Chicago and we talked the matter over" (Rec., p. 244).

Mr. Collins was Chesbrough's personal attorney. In that connection he said: "We met frequently. We discussed the Maltby matters" (Rec., p. 249).

Mr. Chesbrough testified:

"McGraw was sent out. I don't know that I knew he had gone or that he had made a report on the conditions he found; I don't believe I ever saw Mr. McGraw's report until—when Mr. Collins met me in Chicago and I spent that day with him, I think he told me he was ascertaining how much and how big the contracts were with the railroads and when they were receiving ties and where. I don't know as to whether he mentioned what the companies owed Maltby. I don't think they knew. Possibly I had anxiety about the situation at that time" (Rec., p. 277).

Chesbrough, having been present at the meeting when the Maltby inventory was submitted, must have had enough natural curiosity to ascertain from Mr. Collins the new developments in regard to the Maltby account and assets. The jury were justified in inferring that he did so, even without applying the rule of this court in *Thomas v. Taylor*, 224 U. S., 73, (82), that "there is, in effect, an intentional violation of a statute where one deliberately refuses to examine that which it is his duty to examine."

Proof of knowledge is necessarily made by circumstantial evidence, usually by proof of circumstances showing the position occupied by the accused person in relation to the subject matter (see authorities cited above under points IV and X). Chesbrough's proved position was such that the inference of knowledge necessarily followed.

The Circuit Court of Appeals said:

"We think there was evidence fairly indicating that the McGraw report was known to Chesbrough" (Rec., p. 417).

Point XV—Refusal to Direct Verdict.

We can find no separate argument of this point anywhere in defendant's brief. Almost all the other points might be included in this. The discussion of the facts to which the greater part of defendant's brief is devoted, can be excused only on the theory that counsel is attempting to prove that there was no evidence to support the verdict. The different grounds mentioned in the motion to direct a verdict as summarized on pages 101-102 of defendant's brief have all been discussed elsewhere with the exception of the following:

1. Right to sue two out of seven directors.
3. Right of action as an asset of the bank.

1. *Right to Sue Two Out of Seven Directors.*

It seems unnecessary to cite authorities in support of so simple a proposition of law, especially as no authorities to the contrary are cited in defendants' brief.

The rule applicable to joint wrongdoers is that the party injured is "at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others."

1 *Cooley on Torts*, 3rd Ed., p. 224.

Sessions vs. Johnson, 95 U. S., 347.

Atlantic Co. vs. Laird, 164 U. S., 399.

Gaffney vs. Colville, 6 Hill, 567.

The knowing assent, permission or participation in a violation of law is an individual act on the part of each guilty director, and the statute makes "every" participating or assenting director liable in his "personal and individual capacity."

It is elementary that the non-joinder of essential parties defendant must be raised by plea in abatement.

31 *Cyc.*, 175.

Plaintiff sued these two men alone because they had sold their stock, were instrumental in selling their relatives' stock, and had "deserted the ship." The other directors who had sold their stock were dead or beyond the jurisdiction of the court. The Circuit Court of Appeals said (195 Fed., 880):

"The liability of the directors upon such a subject matter is several. The plaintiff may arbitrarily select one as sole defendant or two or more to be joined as defendants. Against each individual selected, a sufficient case must be made out to show that he participated in the tort for which a verdict is had; but the plaintiff's reasons for the selection are wholly immaterial (unless indeed such reason might involve personal feeling affecting plaintiff's credibility as a witness).

3. *Right of Action as an Asset of the Bank.*

This contention rests upon an inexplicable misconstruction of the nature of the action. The class of actions which must be brought in equity in the name of the corporation or its stockholders are actions against the directors, for their negligence in the management of the corporate affairs.

2 *Cook on Corporations*, Sec. 701.

The case at bar does not remotely resemble such an action, but is an action for the individual and special damages suffered by plaintiff, not as a stockholder, but as a member of the public, and resulting from the fact that the fraudulent violation of the law by the defendants induced him to take individual action which he would not otherwise have taken, and which resulted in his individual damage. The \$23,000.00 which he paid for his stock belonged to nobody but himself. This loss was his loss, not that of the bank or of the other stockholders. The wrongs which resulted in the losses to the bank and the other stockholders had already been perpetrated before he bought his stock. His loss was caused not by the directors' negligence in losing the money, but by their fraudulent violation of the statute in concealing its loss by continuing to carry the illegal and worthless loans after knowledge that they were illegal and worthless. The bank and the former stockholders were damaged by the original loss, but not by its concealment. Plaintiff, on the other hand, was damaged by the concealment rather than by the loss itself. He would not have been damaged in any way by the actual loss if it had been charged off as it should have been before he bought his stock, so that he had bought at its actual instead of its fictitious value. The Circuit Court of Appeals said (195 Fed., 880):

“The damages in such a case are personal to the plaintiff. He sues in his own right, not for the association. It suffers no such damage as plaintiff does by the report, and hence it or its receiver has no concern with this kind of an action. It is true there might be a very large number of instances of individual injury resulting from one false report, making a burdensome

volume of litigation; but each instance is individual, involving specific causal relation between report and damages, and the similar instances have no legally common character."

Point XVI—Defendant's Sale of His Stock. (Defendant's brief, pp. 170-174).

By a typographical error this is headed "Point XVIII," on page 170 of defendants' brief.

The evidence in question was, of course, within the principle explained by Mr. Wigmore, which permits proof of "conduct or behavior" as evidencing a "state of mind."

1 *Wigmore on Evidence*, Sec. 264, p. 304, Id., Sec. 265, p. 330.

The Circuit Court of Appeals said (195 Fed., 883):

"In this class of cases, where defendants' actions are to be, from all the circumstances, classified as honest or dishonest, things which indicate that defendants had a motive and profited by their supposed unfair conduct are material. Therefore plaintiff was entitled to show, if he could, that after defendants knew that the Maltby loan, involving more than the whole capital and surplus was at least very doubtful, they sold, at the high price, most of the bank stock owned by themselves and their relatives, and thus, in his language, 'deserted the ship.' "

The questions which are argued in this portion of defendant's brief (pages 170-174) do not bear on the competency or materiality of the testimony. Counsel first discusses the claims of the two defendants as to why they sold their stock (in which respect they contradicted themselves as shown above, and which questions were questions for the jury) and then recurs to the question of the so-called "First National Bank pool" which has been disposed of above under Point VII. In this connection he again makes statements of fact which are without any support in the record. The remaining argument on pages 171-174 has nothing to do

with Point XVI and covers questions which have either been disposed of above or are plainly without merit. The question asked Andrews as to whether the bank lost anything by reason of the fact that the drafts were not accepted, was reshaped by the trial judge so as to eliminate any element of conjecture, or conclusion, *and to counsel's satisfaction* and was then answered by the witness (Rec., p. 231). The trial judge was very careful in his rulings and a mere examination of the context is all that is necessary to meet counsel's complaints.

Point XVII—Alleged Errors in Charge. (Defendant's brief pages 163-167).

There was, of course, a clear distinction between a design to deceive the public, and a design to deceive the plaintiff as an individual. The latter was not alleged. The former was alleged, but was not an essential element of plaintiff's case.

There was in fact much evidence of a conspiracy or design to deceive the public. The secrecy in respect to Lewis' employment and the actual success of the directors in selling their stock and that of their relatives and friends at high prices for months thereafter, show such an efficient concealment of the facts as must have been the result of concerted action. The entire record furnishes circumstantial proof of fraudulent design. In addition we have a few specific admissions. McGraw testified that he voted for the dividends "because we agreed to vote." (Rec., p. 186). Also that

"I signed that statement of February 6, 1903) with the understanding that I had with the entire board that we would all do the same thing, believing that this thing would work out all right. Q. Was that discussed and talked over by the board? A. Yes, sir, time and time again. Q. And the thought was you would finally work out the Maltby situation in some way and you would go on signing statements just the same, letting them go out to the public? A. We believed it would work out all right—the Maltby paper." (Rec., p. 212).

When one of the eight authorized directors, Selwyn Eddy, refused to act as such after his election in January, 1902, the resulting vacancy was not filled either in that year or the succeeding year, but the board was merely left with seven members instead of eight (Rec., p. 172). When Chesbrough sold 57 of his 67 shares of stock in May, 1902, he was anxious to "get rid of" all of it, but finally held enough to qualify as a director, because Mr. Bump asked him to stay on the board (Rec., p. 271). It is the natural inference that Selwyn Eddy's refusal to serve, the reduction of the board from eight to seven, and Mr. Bump's request that Chesbrough remain on the board, were all due to the same facts, viz.: the guilty knowledge of the board, an agreement on their part to stand together in regard to the Maltby paper, and their unwillingness to permit any outsider to take a place on the board and thus discover the true situation. This explains why none of the Maltby paper was charged off until new directors were elected in January, 1905, at which time Mr. Woodworth took his place on the board.

Both defendants gave contradictory reasons for selling their stock. (Rec., pp. 190, 213, 274). Chesbrough's statement that the broker Ames first suggested the sale of his stock (Rec., p. 262), was flatly contradicted by Mr. Ames (Rec., p. 360).

The proof of an actual conspiracy or fraudulent design was offered for what it was worth, but without conceding that such proof was necessary to permit recovery. A knowing violation of the statute whether fraudulent, reckless or otherwise, inevitably entails liability on the part of the director "in his personal and individual capacity for all damages which any person shall have sustained in consequence of such violation." In a case like this, as in a criminal prosecution, proof of a guilty motive is not essential, but it is always competent as corroborative evidence of the offense itself.

12 *Cyc.*, 149-150 and cases cited.

In respect to the other criticisms of the charge to the jury we need say nothing further than to ask that each

paragraph of the charge excepted to, be read with reference to the context. Almost all of the questions raised have been already disposed of. The exceptions to the charge were not sufficiently definite to give the trial judge a fair opportunity to correct inadvertent errors, if any.

Point XVIII—Measure of Damages.

An explanation of the theory of the Circuit Court of Appeals in respect to the measure of damages and of the effect of this theory upon the amount of the verdict is found on pages 17-18 of our former brief. The measure of damages actually applied was, more favorable to defendant than that usually applied in such cases. The general rule is undoubtedly that the measure of damages in such a case is (as stated by the Circuit Court of Appeals, 195 Fed., 885):

“The difference between the sum plaintiff expended in reliance on the representation (i. e. what would have been the fair market value of the property if the representation had been true but not exceeding the sum paid) and the actual intrinsic value of the property which the plaintiff did receive.”

The Circuit Court of Appeals cited a number of decisions of this court and others approving the application of this rule. There can, therefore, be no question but that the rule applied was at least as favorable to defendant as the defendant had any right to expect. The modification of the rule necessitated by the opinion of the Circuit Court of Appeals was entirely to the disadvantage of the plaintiff. Instead of permitting plaintiff to recover the damages usually recoverable in such cases a special rule was framed by the Circuit Court of Appeals to fit this case by which defendant was exonerated from the payment of any damages which he could not and did not calculate in advance. The argument of the Circuit Court of Appeals in justification of this rule is found in 195 Fed., pp. 885-887, and the fallacy of this argument is pointed out on pages 19 et. seq. of our former

brief. The trial judge, of course, followed the opinion of the Circuit Court of Appeals in charging the jury (Rec., p. 386).

With respect to the application by the jury of the rules laid down by the trial judge counsel calls attention to the fact that the verdict was \$5.17 (in fact \$5.47) more than the computation made by plaintiff's counsel and incorporated by the trial judge in his charge. After submitting plaintiff's figures the court had charged the jury as follows:

"Plaintiff claims that the defendant knew that \$200,000 had been lost to the bank and should have been charged off to profit and loss at the time the reports were made in 1903. There is nothing in the testimony fixing that as the particular and exact amount. It is entirely proper for plaintiff to state definitely what he claims, but you must not find for the amount that plaintiff claims or for any other amount, unless you so find by a preponderance of the evidence and under the instructions which I have given you. You should not and must not find the amount for which plaintiff makes claim simply because this is all figured out for you, or for any other reason, except you find it because it is your honest judgment under all of the evidence, and under the law as I have given it to you. I speak of the amount for which plaintiff claims simply as fixing the limit beyond which you cannot go, and leave it entirely to your own good judgment on the evidence, and under the law what amount, if any, you are to find." (Rec., p. 388).

Our computation of interest was made when the requests to charge were dictated, a day or two before the date of the verdict. Apparently when the jury deliberated upon the case, they determined to make their own figures and reached a result \$5.47 greater than the result reached by us. If appellant's counsel can show that their computation is erroneous, we will be glad to remit any excess. Until this is done, we shall assume that the jury's computation is correct and shall consider it as showing that they rendered a verdict for the plaintiff because they intelligently applied the

court's charge to the evidence, and not because they sympathized with the plaintiff and arbitrarily adopted his figures.

Evidence in regard to the disposition of plaintiff's stock, dividends, etc. In view of the fact that the measure of plaintiff's damages as established by the opinion of the Circuit Court of Appeals was less than the loss actually suffered by him, we had been careful during the greater part of the trial to introduce no evidence showing the actual result of the disposition of his stock. Without any excuse, defendants attempted to show by Andrews that the tendency of plaintiff's litigation had been to depreciate the stock of the bank (Rec., p. 169). Plaintiff's counsel then said:

"We object to that. It is absolutely immaterial. It can make no difference whether it affected the stock. We are not claiming anything for that reason. We claim nothing for any depreciation of the stock due to any other cause than the one mentioned in the declaration." (Rec., p. 169).

Notwithstanding the above statement defendants' counsel afterwards recalled Mr. Woodworth and asked the following question:

"Q. You sold three of your shares did you not to Mr. Andrews? A. I just as soon answer what it was for if I am allowed to. I did not sell three shares, I sold two and a half." (Rec., p. 289-290).

Mr. Andrews was later recalled by defendant's counsel and testified:

"I do not know at what price and at what date Mr. Woodworth sold his stock in the Second National Bank. The date is down in the stock book there. I think he sold all of his stock to some of the directors personally, October 16, 1911. It was all sold at that date. I don't know the price." (Rec., p. 368).

Mr. Woodworth was then recalled *by defendants' counsel* and stated that he sold the stock at \$105.00 a share in October, 1911. (Rec., p. 368).

The above testimony was all brought out by defendant's counsel without any provocation and for the sole purpose of discrediting plaintiff by giving the jury the impression that he had unloaded his stock at a fair price and had thus largely recouped his loss. Counsel now take exception because we were not willing to drop the subject where he left it, but naturally insisted upon supplementing it by proof of the real result of the sale to Mr. Woodworth. We showed that before the sale his stock had been cut in half and that no dividends had been paid on it for eight years. In other words he bought 155 shares of stock for \$23,420.00. The stock was then reduced to 77½ shares, when the capital stock of the bank was cut in half. Andrews then did not have enough left to qualify as a director so that plaintiff sold him two and one-half shares for that purpose at an arbitrary price of \$150.00 a share. (Rec., p. 371). For these two and one-half shares he therefore received \$375.00. He sold the other 75 shares in 1911 at \$105.00 a share or \$7,875.00 making the entire amount received \$8,250.00. He had received no dividends whatever so that his damages on this basis would be the difference between \$23,420.00 and \$8,250.00, or \$15,170.00 without computing interest. In addition, his loss would include interest on the entire amount up to October, 1911, when he sold his stock, and interest on his margin of loss from that date to the date of the verdict, which at five per cent amounts to more than \$10,000.00, making his total actual loss more than \$25,000.00 or almost \$3,000.00 in excess of the verdict, without including any of the large expenses of his litigation. It is hard to believe that defendant's counsel is sincere in assuming that he could show half of the facts in an attempt to discredit the plaintiff, and could then successfully assign error because we insisted on supplementing his incomplete showing.

The cases cited on pages 178-181 of defendant's brief are entirely out of place. The rule of damages which is criticized by defendant's counsel is a rule which has never been applied and which we have never attempted to apply in this case.

At the conclusion of defendant's brief (pages 181-188) counsel discusses a number of cases under the heading

"cases cited for plaintiff." This part of the brief is a relief of the briefs filed on the first hearing before the Circuit Court of Appeals when the law on the subject was still unsettled and the cases of Taylor vs. Thomas and Yates vs. Jones National Bank had not been reported. The greater number of the cases mentioned (although many of them are still in point and are still good law) have become unimportant because of the clarification of the law on the subject by the opinions of this court in the Thomas and Yates cases. It is, therefore, unnecessary to discuss the superficial differences between the cases referred to and the case at bar. The present case was submitted to the jury upon a charge which carefully followed the opinions of this court in the Thomas and Yates cases. The law of those cases was logically and intelligently applied to the facts, and the charge of the trial judge was carefully adjusted to any superficial differences which might have appeared. The judgment of the District Court should be affirmed.

Respectfully submitted,

Edward S. Clark

John S. Meadock

*Attorneys for Frank T. Woodworth,
Defendant in Error in Case No. 179.*





IN THE
Supreme Court of the United States

U. S. Supreme Court, D. C.

FILED

SEP 17 1915

JAMES B. MAHER
CLERK

FRANK T. WOODWORTH,
Plaintiff in Error,

vs.

FRANK P. CHESBROUGH,
Defendant in Error.

Docket No.  180
October Term 1915.

Error to the Court of Appeals, Sixth Circuit.

MOTION OF DEFENDANT IN ERROR TO QUASH
CROSS WRIT OF ERROR HEREIN,
BRIEF IN SUPPORT THEREOF, AND PROOF
OF SERVICE.

THOMAS A. E. WEADOCK,
Attorney for Defendant in Error.

GILLETT & CLARK,
EDWARD S. CLARK,
Attorneys for Plaintiff in Error.

DETROIT:
CONWAY BRIEF CO., 142-150 LAFAYETTE BOULEVARD.
1915.

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IN THE

Supreme Court of the United States

FRANK T. WOODWORTH, vs. FRANK P. CHESBROUGH,	}	Plaintiff in Error, Defendant in Error.
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No. 537.
October Term 1915.

And now comes Frank P. Chesbrough, defendant in error herein, by Thomas A. E. Weadock, his attorney and counsel, and moves to quash, with costs, the paper purporting to be a cross writ of error herein taken out by the above named Frank T. Woodworth, for want of jurisdiction, upon the grounds stated in the annexed argument and other grounds, viz.: That said plaintiff in error before the writ herein issued in order to review the decision of the United States Circuit Court of Appeals, for the Sixth Circuit, had remitted the amount in question herein.

Said Court of Appeals on April 6th, 1915, filed its opinion granting said defendant in error, Frank P. Chesbrough, a new trial unless said Woodworth remitted a sum, subsequently found to be \$7,708.56 from the judgment of \$23,714. rendered in said Woodworth's favor by said District Court, and that in either event said Chesbrough would recover costs in said Circuit Court of Appeals.

Thereafter said Woodworth filed in said Court of Appeals on May 7th, 1915, a certified copy of the remittitur of the sum of \$7,708.56 filed by him in said District Court on May 5th, 1915, on filing of which certified copy of said remittitur in said Court of Appeals, said Court on May

11th, 1915, affirmed the judgment of said District Court, in the sum of \$16,005.44, said Chesbrough to recover costs of said Court of Appeals.

Said purported cross writ of error was issued on June 17th, 1915.

THOMAS A. E. WEADOCK,
*Attorney for Frank P.
 Chesbrough, Defendant in
 Error.*

CERTIFIED COPY OF REMITTITUR.

UNITED STATES OF AMERICA. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN . NORTHERN DIVISION.

FRANK T. WOODWORTH,

Plaintiff,

vs.

FRANK P. CHESBROUGH,

Defendant.

No. 137.

In compliance with the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, filed April 6, 1915, the above named plaintiff hereby remits from the amount of the judgment entered herein on November 22, 1913 (said judgment having been entered at the sum of \$23,714.00), the sum of \$7,708.56, leaving the amount of said judgment the sum of sixteen thousand and five dollars and forty-four cents (\$16,005.44), which is entered as of November 22, 1913, and is to bear interest from that date, at five per cent.

This remittitur is filed in compliance with the opinion of the Circuit Court of Appeals as aforesaid, for the sole purpose of obtaining the entry of a final judgment here-

in, and of securing the affirmance of that part of the judgment which is not so remitted, and is intended to be without prejudice to plaintiff in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States, which cross proceeding follows and continues to be in connection with any proceeding prosecuted in that Court by defendant for the purpose of reviewing said judgment of the Circuit Court of Appeals.

FRANK T. WOODWORTH,

Plaintiff.

By GILLETT & CLARK,

JOHN C. WEADOCK,

His Attorneys.

Dated, May 5th, 1915.

Endorsed, No. 2634, In the Circuit Court of Appeals, for the Sixth Circuit. Frank P. Chesbrough, Plaintiff in Error, Frank T. Woodworth, Defendant in Error. Certified copy of Remittitur. John C. Weadock, Gillett & Clark, 230-231 Shearer Bldg., Bay City, Mich., Attys. for Deft. in Error.

UNITED STATES OF AMERICA, {
EASTERN DISTRICT OF MICHIGAN. { ss.

I, Elmer W. Voorheis, clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy of Remittitur filed May 5th, 1915, in the therein entitled cause as the same appears on file and of record in my office; that I have compared the same with the original, and it is a true and correct transcript therefrom and of the whole thereof.

IN TESTIMONY WHEREOF, I
have hereunto set my hand and affixed
the seal of said Court, at Bay City in

[SEAL.]
Ten Cent
Documentary Stamp.

said District, this fifth day of May, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America the one hundred and thirty-ninth.

ELMER W. VOORHEIS, *Clerk*,
By O. BALLOU, *Deputy Clerk*.

Endorsed, C. C. A. No. 2634, No. 137, The District Court of the United States, Eastern District of Michigan, Northern Division. Frank T. Woodworth, Plaintiff, vs. Frank P. Chesbrough, Defendant. Certified copy of Remittitur filed May 5th, 1915. Filed May 7, 1915. Frank O. Loveland, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE
SIXTH CIRCUIT.

I, William C. Cochran, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Remittitur filed May 7, 1915, in the case of Frank P. Chesbrough vs. Frank T. Woodworth, No. 2634, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 27th day of July, A. D. 1915.

WILLIAM C. COCHRAN,

*Clerk of the United States
Circuit Court of Appeals
for the Sixth Circuit.*

Seal of the
United States
Circuit Court of
Appeals, Sixth
Circuit.
Ten Cent
Documentary Stamp.
Dated, July 27, 1915.

CERTIFIED COPY OF JUDGMENT OF COURT OF
APPEALS.

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE
SIXTH CIRCUIT.

FRANK P. CHESBROUGH, Plaintiff in Error,	}	No. 2634.
vs.		
FRANK T. WOODWORTH, Defendant in Error.	}	

Error to the District Court of the United States for the Eastern District of Michigan, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, Northern Division, and was argued by counsel.

The Court having filed its opinion, and defendant in error, Woodworth, having thereupon filed in this court a certified copy of a remittitur filed by him in the court below whereby it appears that the judgment complained of herein has been reduced by the sum of seven thousand seven hundred eight dollars and fifty-six cents (\$7,708.56), so that it now stands in the court below as a judgment for sixteen thousand five dollars and forty-four cents (\$16,005.44), and costs, entered as of November 22, 1913, and bearing interest from that date at five per cent.

It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause, as so reduced, and as so standing after such reduction, be, and the same is hereby, affirmed; but that plaintiff in error, Chesbrough, recover the costs of this court.

The remittitur so filed having contained the clause stating that it was intended to be without prejudice to plaintiff below (Woodworth) in the prosecution by him of

a cross writ of error or proceeding in the Supreme Court if defendant below should proceed in that court to review this judgment, and this court being unwilling to embarrass the party, Woodworth, in his attempt to preserve any right of review to which he may be so contingently entitled, approval of such remittitur, as a sufficient compliance with the opinion on file, is not withheld because of the presence therein of such attempted reservation; but such approval is not to be taken to imply that such right of review can thereafter exist, or that such attempted reservation has any effect to make the remittitur other than absolute and unconditional.

May 11, 1915.

UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE
SIXTH CIRCUIT.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of judgment entered May 11, 1915, in the case of Frank P. Chesbrough vs. Frank T. Woodworth, No. 2634, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I
have hereunto subscribed my name,
and affixed the seal of said Court, at
the City of Cincinnati, Ohio, this 16th
day of August, A. D. 1915.

Seal of the
United States
Circuit Court of Appeals,
Sixth Circuit.

WILLIAM C. COCHRAN,

*Clerk of the United States
Circuit Court of Appeals
for the Sixth Circuit.*

Documentary Stamp,
Ten Cents.
Stamp marked,
"Cancelled 8/16/15
A. B. M."

By ARTHUR C. MUSSMAN, Deputy.

Sirs:

Please take notice that on the annexed certified copies of a remittitur filed in the United States Circuit Court of Appeals for the Sixth Circuit on May 7th, 1915, and of the judgment of the Court of Appeals, and on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States at a Stated Term thereof, on Monday, October 11th, 1915, at the capitol in the City of Washington, in the District of Columbia, at the opening of court on that day, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy; and that I shall submit with said motion, and in support of the same, the argument annexed to said certified copies and proceedings.

Dated, Detroit, Mich., August 19th, 1915.

Yours, etc.,

THOMAS A. E. WEADOCK,

*Attorney and of Counsel for
Defendant in Error.*

810-811 Hammond Building,
Detroit.

TO GILLETT & CLARK,

EDWARD S. CLARK,

*Attorneys for Plaintiff in Error,
Shearer Building, Bay City.*

ARGUMENT.

The opinion of the Court of Appeals allowed Chesbrough, plaintiff in error in that Court, and defendant in the District Court, a new trial of the action unless Woodworth, plaintiff therein, would remit from his judgment of \$23,714.00 the sum by which his said judgment exceeded a sum figured on what the Court of Appeals deemed the correct basis, and Chesbrough was awarded costs of the Court of Appeals in any event. This sum was ascertained to be \$7,708.56 and Woodworth filed in the Dis-

trict Court a remittitur of that sum, then filed a certified copy of that in the Court of Appeals as required by its opinion.

In the remittitur filed was the self serving statement that it was filed for the "sole purpose of securing the affirmance of the balance of the judgment," and "is intended to be without prejudice to plaintiff in any cross proceeding hereafter prosecuted by him before the Supreme Court of the United States," etc.

This statement was answered by the Court of Appeals in its judgment as follows:

"The remittitur so filed having contained the clause stating that it was intended to be without prejudice to plaintiff below (Woodworth) in the prosecution by him of a cross writ of error or proceeding in the Supreme Court if defendant below should proceed in that court to review this judgment, and this court being unwilling to embarrass the party, Woodworth, in his attempt to preserve any right of review to which he may be so contingently entitled, approval of such remittitur, as a sufficient compliance with the opinion on file, is not withheld because of the presence therein of such attempted reservation; but such approval is not to be taken to imply that such right of review can thereafter exist, or that such attempted reservation has any effect to make the remittitur other than absolute and unconditional."

Notwithstanding this, the alleged cross writ of error herein was issued in behalf of Woodworth.

He did not pay the costs awarded to Chesbrough by the Court of Appeals.

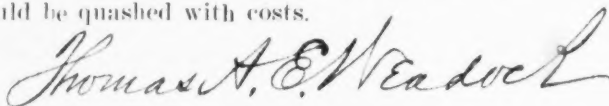
He accepted the judgment of the Court of Appeals, affirming the judgment of \$16,005.44 of the District Court in his favor, thereby avoiding a new trial. 221 Fed. 912.

Therefore, under the decisions of this Court, he cannot maintain a cross writ of error.

In *Koebingsberger vs. Richmond Silver Min. Co.*, 158 U. S. on page 52, this court said:

"The plaintiff, by not insisting on the alternative, allowed him by the Court, of having a new trial of the whole case, but electing the other alternative allowed, of filing a remittitur of half the amount of the original judgment, and thereupon moving for and obtaining an affirmance of that judgment as to the other half, waived all right to object to the order of the court of the benefit of which he had availed himself. *Kennon vs. Gilmer*, 131 U. S. 22, 30; *New York Elevated Railroad vs. Fifth National Bank*, 135 U. S. 432."

I submit that under the above authorities, the cross writ of error should be quashed with costs.



Attorney for Frank P. Chesbrough,

Defendant in Error.

UNITED STATES OF AMERICA, }
 EASTERN DISTRICT OF MICHIGAN. } ss.

Thomas A. E. Weadock, of Detroit, in said district, being duly sworn, says that on the 23d day of August, A. D. 1915, he served the foregoing motion to quash and dismiss the cross writ of error herein, upon Edward S. Clark, one of the attorneys for Frank T. Woodworth, plaintiff in said cross writ, by depositing in the post office at Detroit aforesaid, true copies of said motion, remittitur, judgment and argument, together with a notice, signed by deponent, that said motion would be brought on for argument on October 11th, 1915, all properly enclosed in a sealed envelope, with full letter postage prepaid thereon, addressed to Edward S. Clark at his office in the Shearer Block, Bay City, Michigan.

Further saith not.

THOMAS A. E. WEADOCK.

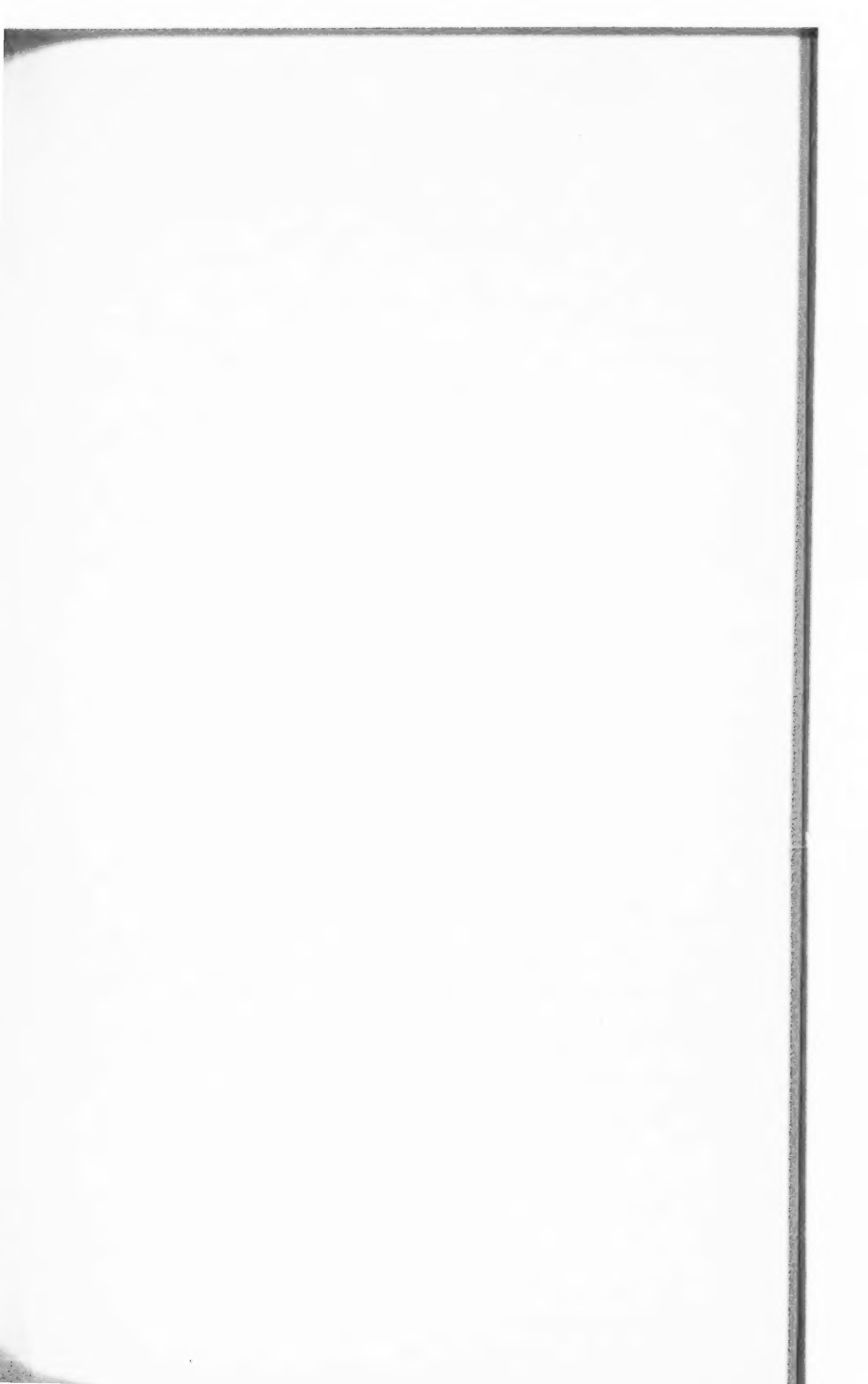
Subscribed and sworn to before me
 this 23d day of August, A. D. 1915.

MARTHA E. SPENCER,

Notary Public, Wayne County, Michigan.

My Commission expires April 9, 1918.

[Notary Seal.]





FILED
SEP 24 1915
JAMES D. MAHER
CLERK

UNITED STATES OF AMERICA

IN THE SUPREME COURT OF THE UNITED
STATES, OCTOBER TERM, 1915

No.  180

FRANK T. WOODWORTH,
Plaintiff in Error,

vs.

FRANK P. CHESBROUGH,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO
DISMISS WRIT OF ERROR.

EDWARD S. CLARK;
JOHN C. WEADOCK,
Attys. for Plaintiff in Error.

GILLETT & CLARK,
of Counsel.

THE HISTORY OF THE
CITY OF BOSTON

FROM THE FIRST SETTLEMENT TO THE PRESENT TIME

BY NATHANIEL BENTLEY

1857

UNITED STATES OF AMERICA

IN THE SUPREME COURT OF THE UNITED
STATES

OCTOBER TERM, 1915

No. 537

FRANK T. WOODWORTH,
Plaintiff in Error,

vs.

FRANK P. CHESBROUGH,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE
SIXTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO
DISMISS WRIT OF ERROR.

STATEMENT OF FACTS.

The writ of error, which is the subject of this motion, is what is commonly called a "cross writ" of error. The original writ of error is docketed as case number 536 of the October term, 1915. Both cases involve precisely the same record and judgment, and both writs were incorporated in one transcript by the clerk of the Circuit Court of Appeals. The case involves the construction of the "National Bank Act," and the right of review is therefore apparently absolute, so that there is no apparent ground for the dismissal of

the writ in case number 536, and that case will presumably be heard on its merits.

The present motion to dismiss is merely designed to eliminate the "cross writ" of error. The original defendant Chesbrough (hereinafter referred to as defendant), seeks to prevent the original plaintiff, Woodworth (hereinafter referred to as plaintiff), from reviewing that part of the judgment of the Circuit Court of Appeals which was prejudicial to the plaintiff, while at the same time preserving defendant's right to a review of the same judgment on defendant's writ of error in case number 536.

The opinion of the Circuit Court of Appeals—see 221 Fed. 912 (916)—gave plaintiff the option between submitting to a reversal of the judgment and a reduction of the amount by remittitur. Plaintiff filed the remittitur, and it is contended that by so doing he lost his right to the issuance of a cross writ of error.

A reference to the remittitur (motion, pages 2-3), will show that it contains an unusual clause, intended to prevent its operation as a waiver. The proceedings before the Circuit Judge in chambers, in regard to the form of the remittitur and judgment, do not appear in the record, but it is a fact (and may be reasonably inferred from the language of the judgment (pages 5-6 of the motion) that the precise language used and the failure to include in the remittitur a still broader disclaimer of any intention to waive plaintiff's rights in this court, were due to the necessity of obtaining from the Circuit Court of Appeals their approval of the form of the remittitur as a sufficient compliance with the opinion on file.

The Circuit Court of Appeals finally accepted and approved of the remittitur in its present form, and thereafter permitted the entry of final judgment and the issuance of the cross writ of error which it is now sought to dismiss.

ARGUMENT.

The motion to dismiss should be denied for the following reasons:

1. It is prematurely made in advance of the printing of the record.

2. Defendant's remedy, if any, is not by motion to dismiss, but upon final hearing.

3. The question involved is one of waiver, which is always a question of intent. The motion shows that no waiver was intended.

1. *Motion Prematurely Made.*

The cases were only recently docketed. No extra copies of the record were filed in the Circuit Court of Appeals so as to permit the use of the same printed record in this court as authorized by the act of February 13, 1911. (36 Stat. at Large, 901, West Comp. of 1913, Secs. 1656-1657.) The record in this court has not yet been printed. Reference to it is necessary for a full understanding of the merits of the motion. The motion itself does not even contain a copy of our assignment of errors, to enable the court to ascertain whether all of the errors relied on are of the same nature. It is well settled that this court will not refer to the original transcript, and will not, in ordinary cases requiring a reference to the record, entertain any motion to dismiss until the record is printed.

St. Louis National Bank vs. Insurance Co., 10 Otto (100 U. S.) 43.

Waterville vs. VanSlyke, 115 U. S. 290.

The questions raised by our writ of error (case No. 537) are very closely connected with the questions sought to be reviewed by the defendant Chesbrough on his writ of error. (Case No. 536.) We wish to preserve our right to have this court correct all errors found, not merely those which prejudice the defendant only. If our writ of error is dismissed, the plaintiff Woodworth will have been deprived of the substantial sum of \$7,708.56 without any opportunity of reviewing the rulings which have deprived him of this sum. No one will be benefited by the dismissal except the defendant Chesbrough. The court itself will not be materially relieved, because all of the questions sought to be raised by us will be incidentally involved in the hearing on the defendant Chesbrough's writ of error. The record will

not be materially shortened by the dismissal, because the defendant Chesbrough has assigned error on the refusal to direct a verdict in his favor; (see Assignment of Error No. 20 in case No. 536), which will necessitate the printing of the entire record of the Circuit Court of Appeals containing the substance of all the proceedings on the trial of the case. The same record will serve for both cases, and upon such record this court can, without any additional labor, determine on the final hearing of case No. 536, and almost incidentally thereto, all of the questions raised by the cross writ of error in case No. 537. It would therefore be a useless hardship to dismiss the writ in advance of a hearing on the merits.

2. *Motion to dismiss not the proper remedy.*

The Circuit Court of Appeals permitted the writ of error to be issued. Its issuance was entirely regular. The alleged waiver relied on to support the motion to dismiss was an independent fact not directly connected with the issuance of the writ itself. It did not affect the jurisdiction of the court or the regularity of the writ, but involved a separate and independent question. We are not trying to exclude this question from the consideration of the court, but admit that it will be a proper subject of argument on the final hearing. It furnishes no support, however, for a motion to dismiss. In the case relied on in support of the motion (*Koenigsberger vs. Mining Co.*, 158 U. S. 41), it was not held that the writ of error should have been dismissed, but the waiver was a subject of argument and decision on the final hearing as in any other case where error is waived.

"Want of jurisdiction and irregularity of the writ are the only grounds for dismissal. Where a judgment appears to have been rendered which the party is entitled to have revised in this court, and it is also seen that it comes here for such revision upon proper process, duly issued, all other questions must await the final hearing."

Hecker vs. Fowler, 1 Black (66 U. S.) 95.

We have assigned error on seven different grounds. Does our claimed waiver extend to all of these grounds, or less than all? How can this question be decided in the

present motion? In any case, how can this question affect the *jurisdiction of the court or the regularity of the writ?*

3. *No Waiver was intended.*

The rule upon which we rely is so elementary and the decisions on the subject so numerous that we may be pardoned for referring to these decisions collectively as cited in a standard text book. The most universally approved definition of waiver is the "intentional relinquishment of a known right," and it has been universally held that waiver is a voluntary act, and that action is in no sense voluntary which a party cannot decline to take, except at his peril. That the question of waiver is mainly a question of intention.

40 Cyc., pages 252-261, and cases cited.

This court have approved these rules, holding that "acquiescence and waiver are always questions of fact, and that there can be neither without knowledge."

Pence vs. Langdon, 9 Otto (98 U. S.) 578.

Also that waiver must be intentional and with knowledge of the circumstances.

Benneke vs. Insurance Co., 15 Otto (105 U. S.) 355.

Estoppel, as distinguished from waiver, implies that the other party has been misled to his prejudice.

40 Cyc. 256-257, and cases cited.

In the case at bar, the act of filing the remittitur constituted neither a waiver nor an estoppel.

The question of estoppel is disposed of by the fact that there were no alternatives before the defendant Chesbrough, in respect to which his choice was in any way influenced by the filing of the remittitur. His only choice was between the payment of the judgment and the issuance of a writ of error to review it. He chose the latter course, and could not have been influenced in so doing by the filing of the remittitur. In fact, the filing of the remittitur by reducing the

amount to be paid would naturally have encouraged the payment of the judgment. His choice as actually made would have been naturally inhibited rather than induced by the filing of the remittitur, and this inhibitory effect was enhanced by the express reservation contained in the remittitur which notified him that the issuance of a writ of error by him would be followed by the issuance of a cross writ of error by plaintiff. The natural effect of plaintiff's action upon defendant's mental processes was therefore diametrically opposite to that which is supposed to form the basis of an estoppel.

So far as the question of waiver is concerned, by filing the remittitur, plaintiff unquestionably waived every right which he *voluntarily* abandoned, including the right to choose a new trial as an alternative to the filing of the remittitur. However, the *making* of the election was not a voluntary act, but was a necessity imposed upon plaintiff by the opinion of the Circuit Court of Appeals. It was the imposition of this necessity which he should be permitted to review. The election itself (as distinguished from the *nature* of the election) being a non-voluntary act, did not constitute a waiver of the right to review the propriety of compelling him to make the election. At the same time we concede that he has definitely waived the right to make a *different* election if the right to *require* an election is upheld by this court. The only thing waived is the right to change the *nature* of the election, if an election is finally required.

We think it plain that the question involved is not a question of waiver or estoppel, but purely a question of election. By electing one of the alternatives submitted by the opinion and judgment of the Circuit Court of Appeals, plaintiff finally loses his right to elect the other alternative. This, however, is an entirely different question from that of his right to attack the judgment necessitating the making of the election to which he has always excepted and never consented.

Possibly if the remittitur had been filed without saving any of plaintiff's rights, as was done in the Koenigsberger case, he might have waived the error. Waiver, however, being a question of intention and his rights having been expressly reserved, and such reservation having been approved

(or not disapproved) by the Circuit Court of Appeals, and the issuance of the cross writ of error authorized, the Koenigsberger case is not in point, and there is now no reason why we should not be entitled to a hearing on the merits in this court.

The defendant Chesbrough, having declined to be content with the judgment as finally entered, and having elected to review that judgment by writ of error, is not in the same position to raise the question of waiver on our part as he would have been if he had accepted the judgment of the Circuit Court of Appeals as final. He cannot consistently rely on the judgment as concluding the plaintiff and at the same time attack it by means of his own writ of error.

We believe that the questions which we wish to raise are meritorious, and ask that the motion be denied in order that the plaintiff may not be deprived of substantial rights without a hearing on the merits.

Respectfully submitted,

Edward Clark
John Weadock
Attorneys for Plaintiff in Error.

GILLET & CLARK,

Of Counsel.

STATE AND EASTERN DISTRICT OF MICHIGAN, }
County of Bay. } ss.

Laura Braun, of Bay City, Michigan, being duly sworn deposes and says that on the..... day of September, 1915, she served a copy of the above brief on T. A. E. Weadock, attorney for Frank P. Chesbrough, the defendant in error herein, by enclosing the same in a sealed envelope plainly addressed to the said Weadock at Hammond Building, Detroit, Michigan, that being his business address, and depositing the same in the United States post office at Bay

City, Michigan, duly postpaid, the same being so deposited as to reach the said addressee by due course of mail more than one week before the 11th day of October, 1915, that being the day set for the submission of the motion in opposition to which said brief is filed.

.....
Subscribed and sworn to before me,
this..... day of September, 1915.

.....
Notary Public, Bay County, Michigan.
My commission expires